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IN THE

Supreme Court of the United States

October Term, 1983

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION, and AL BRYANT ASSOCIATES, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 82-3169.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether an unfair labor practice charge alleging a double breasted construction contractor's refusal to bargain by operating a non-union company is barred by the six month statute of limitations established by 29 U.S.C. Section 160(b) where the charging union knew the contractor had been awarded a contract in its jurisdictional area in January, 1979, the employer began work on the project in June, 1979, and the union filed its charge in October, 1979?

2. Whether an unfair labor practice charge alleging a double breasted construction contractor's refusal to bargain by operating a non-union company is barred by the six month statute of limitations established by 29 U.S.C. Section 160(b) where the charging union knew of the contractor's allegedly wrongful conduct more than six months prior to the filing of the charge, sent the contractor a letter requesting bargaining on March 19, 1979, and filed its charge on August 10, 1979?

3. Whether the duty to bargain of a non-union company that is a component of a double breasted construction operation is determined by the union's agreement with the union company component of the double breasted operation so that the National Labor Relations Board must defer to the contract arbitrator's decision respecting the extent of that duty?

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The June 30, 1983 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed is reported at 711 F.2d 543 (3d Cir. 1983) and is reprinted in the Appendix to this Petition page A1. The prior opinion of the National Labor Relations Board is reported at 260 N.L.R.B. No. 10 (1982) and is reprinted

in the Appendix to this Petition at page A27. The opinion of the Administrative Law Judge is reprinted in the Appendix to this Petition at page A38.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provisions Involved

Section 8(a) of the National Labor Relations Act, 29 U.S.C. Section 158(a) provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

. . . . . .

(5) to refuse to bargain collectively with the representatives if his employees, subject to the provisions of section 9(a).

Section 8(f) of the National Labor Relations Act, 29 U.S.C. Section 158(f) provides impertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because

(1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement or, . . .

(3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment . . .

Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b) provides in pertinent part:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a) provides in pertinent part:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Statement of Case

This unfair labor practice case involves charges that Petitioners, Al Bryant, Inc., Harrisburg Drywall and Construction Corp., and Al Bryant Associates, Inc., violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. Sections 158(a)(5) and (1), by refusing to bargain collectively with their employee's representatives.

The Parties

Petitioner Al Bryant, Inc. (ABI) is an interior design and finishing contractor engaged in hanging drywall, installing ceilings, and laying floors. ABI was formed in 1967 by Albert Bryant. During the relevant period, ninety percent of the stock of ABI was owned by Albert Bryant who also served as president of ABI. Albert Bryant's wife owned the remaining ten percent of ABI and served as its treasurer. ABI maintained an office in Harrisburg, Pennsylvania in a building owned by the Bryants.

Petitioner Harrisburg Drywall and Construction Corp. (Harrisburg Drywall) is a contractor engaged in the same type of work as ABI. Harrisburg Drywall was incorporated in 1971. At the time of its incorporation Harrisburg Drywall was operated by Geno Premici. Albert Bryant owned fifty-one percent of Harrisburg Drywall's stock. He acquired the remaining forty-nine percent of Harrisburg Drywall's stock in 1972. In 1975, Albert Bryant selected Charles May as Harrisburg Drywall's president. Albert Bryant continued as Harrisburg Drywall's vice-president and secretary. Jean Hoffman, ABI's secretary acted as Harrisburg Drywall's treasurer.

Petitioner Al Bryant Associates, Inc. (Associates) is a contractor performing the same type of work as ABI. Associates was formed in 1979 by Albert Bryant, Larry McClain, and Jean Hoffman. Larry McClain owned thirty-five percent of Associates' stock and served as its president. Albert Bryant served as Associates' treasurer and vice-president in charge of sales and owned thirty percent of its stock. Jean Hoffman owned thirty-five percent of Associates stock and served as its secretary and vice-president in charge of administration.

The charging parties are the United Brotherhood of Carpenters and Joiner of America, Carpenters' District Council of Western Pennsylvania (Western) and Keystone District Council (Keystone). These two unions were parties to a collective bargaining agreement negotiated with the Central Pennsylvania Subcontractors Association (CPSA), a multi-employer bargaining unit of which ABI was a member. Western and Keystone operate in different geographic areas.

The Relationship of the Parties

ABI operated as a union contractor. As a member of the CPSA, ABI was bound by the terms of that association's agreement with the charging unions. Harrisburg Drywall operated as an open shop contractor. Together, ABI and Harrisburg Drywall constituted a double breasted construction operation. Double breasting allows a contractor to bid on both union and non-union projects. Both the National Labor Relations Board (Board) and this Court have permitted construction contractors to operate on a double breasted basis. See *South Praire Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976) (*per curiam*).

Associates was formed after the unfair labor practice charges in question were filed. Associates, like Harrisburg Drywall, operated as a non-union contractor. Associates occupied the same building as Harrisburg Drywall and performed work in areas under the jurisdiction of Western and Keystone.

The Operative Events

This case had its genesis in January, 1979. In that month, Western learned that Harrisburg Drywall had been awarded a subcontract on a project in Venango County, Pennsylvania, a site within Western's jurisdictional area. Western's representative contract Albert Bryant and requested that Union members be employed on the project. Albert Bryant refused this request stating that the job was being performed by Harrisburg Drywall. Work on the project commenced in June, 1979. On October 3, 1979, Western charged that ABI, doing business as Harrisburg Drywall, failed and refused to bargain with it in violation of Section 8(a)(5) of the Act. 29 U.S.C. Section 158(a)(5).

Petitioners' difficulties with Keystone began in March, 1979. Sometime prior to this date, Keystone learned that some of its members had been employed by Harrisburg Drywall and that Harrisburg Drywall had performed work covered by the CPSA—Keystone Agreement without adhering to the terms of that agreement.

On March 19, 1979, Keystone sent a letter to ABI asserting that Harrisburg Drywall was a "subsidiary" or "joint venture" with ABI and therefore was obligated to observe the terms of the CPSA agreement. This letter resulted in an arbitration proceeding. Keystone presented both its claim that Harrisburg Drywall was obligated to observe the terms of the CPSA agreement

as a matter of contract law and as a matter of federal labor law to the arbitrator. The arbitrator denied this grievance on October 29, 1979.

On August 10, 1979, during the pendency of the arbitration proceeding, Keystone filed its initial unfair labor practice charge with the Board. This charge was based upon the same conduct as the grievance proceeding; that ABI and Harrisburg Drywall violated the Keystone collective bargaining agreement by hiring non-union employees, operating a non-union subsidiary, and failing to recognize the union as the bargaining representative of Harrisburg Drywall's employees.

Keystone filed an amended unfair labor practice charge with the Board on October 6, 1980. This charge alleged that ABI, Harrisburg Drywall, and Associates had refused to bargain with Keystone since August, 1980.

The Board issued complaints based upon these charges. A hearing concerning these charges was held on December 10, 1980.

The Rulings Below

The Board's opinion, 260 N.L.R.B. No. 10 (1982) (Pet. App. A27), substantially affirmed the decision of the Administrative Law Judge (Pet. App. A38). The Board found that ABI, Harrisburg Drywall, and Associates constituted a single employer, that Harrisburg Drywall was the alter ego of ABI and that Associates was the alter ego of Harrisburg Drywall. The Board also ruled that Western and Keystone had filed their unfair labor practice charges within the six months limitations period prescribed by Section 10(b) of the Act. 29 U.S.C. Section 160(b).

The Board, therefore, ruled that Petitioners violated Sections 8(a)(1) and (5) of the Act. 29 U.S.C. Sections 158(a)(1) and (5). In rendering its decision, the Board refused to defer to the arbitrator's prior decision. Petitioners were ordered to recognize the charging Unions as the bargaining representatives of their employees and to compensate their employees for losses they suffered because of Petitioners' violation.

The Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its order. The Court of Appeals, while disagreeing with a portion of the Board's opinion, granted the Board's application for enforcement. 711 F.2d 543. (1983) (Pet. App. A1). In rendering its decision the Court of Appeals acknowledged that "... there does not appear to be any clear precedent on when the Section 10(b) period begins to run with respect to Section 8(a)(5) charges growing out of double breasted operations." (Pet. App. A9).

Jurisdiction of Federal Court in First Instance

The Federal Court of first instance in this case was the United States Court of Appeals for the Third Circuit. The jurisdiction of this Court was invoked pursuant to 29 U.S.C. Section 160(e).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. Timeliness of the Charges

Certiorari Should Be Granted To Resolve An Important Question Of Federal Law That Has Not Been Decided By This Court.

Should 10(b) of the National Labor Relations Act, (Act), 29 U.S.C. Section 160(b), provides "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." Petitioners argued before the Board and in the Court of Appeals below that, with respect to Western, the six month limitations period began to run in January, 1979 when Western learned that Harrisburg Drywall had been awarded the Venango County, Pennsylvania subcontract. This date was more than six months prior to Western's October 3, 1979 filing of its charge with the Board. Petitioners respectfully submit that this delay renders Western's charge untimely under Section 10(b) of the Act.

The Administrative Law Judge, whose findings were substantially adopted by the Board, concluded that the Section 10(b) limitations period did not begin to run until Harrisburg Drywall actually commenced work at the Venango County project in June, 1979 (Pet. App. A56). The Court of Appeals agreed with this conclusion stating that, "Since Western had no basis for filing a charge until work on the Venango County job began, its charge was timely." (Pet. App. A8). The clear negative implication of this statement is that, if petitioner's January, 1979 conduct constituted an unfair labor practice, Western's charge was untimely.

The Court of Appeals cited two cases in support of its conclusion. *NLRB v. Plumbers and Pipe Fitters Local Union 214*, 298 F.2d 427 (7th Cir. 1962); *Local 1104, Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). Neither case offers a compelling analogy. Both cases involved union discrimination in violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act. 29 U.S.C. Sections 158(b)(1)(A) and (2). The case *sub judice* concerns employer refusals to bargain in violation of Sections 8(a)(1) and (5) of the Act. 29 U.S.C. Section 158(a)(1) and (5). Neither case cited by the Court of Appeals involved a double breasted construction employer. Respondents in the instant case constitute a double breasted construction operation.

The Seventh Circuit Court of Appeals in *NLRB v. Plumbers and Pipe Fitters Local Union 214*, 298 F.2d 427 (7th Cir. 1962) noted that Section 8(b)(2) of the Act creates two separate unfair labor practice charges; one for actually causing an employee's discriminatory discharge, the other for attempting to cause the employee's discriminatory discharge. On May 15, 1959, Local Union 214 sent a letter demanding the employee's discharge because of his failure to join the union. The employee was actually discharged on May 25, 1959. The employee filed his unfair labor practice charge alleging his discriminatory discharge on November 23, 1959. The Seventh Circuit ruled that this charge was timely since the employee's discharge was not "caused" until he was actually dismissed. The issue of the timeliness of the arguably barred charge, attempting to cause discrimination, was not even presented to the Court. Therefore, Petitioners respectfully submit, the Court of Appeals was incorrect in relying upon *NLRB v. Plumbers and Pipe Fitters Local Union 214*.

The Court of Appeals reliance upon *Local 1104, Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) is particularly puzzling. That case, in pertinent part, presented the Second Circuit Court of Appeals with unfair labor practice charges arising with unfair labor practice charges arising from a union's denial of membership to individuals who had refused to honor picket lines during a strike. The Second Circuit held, as the Third Circuit Court of Appeals stated that ". . . when an unfair labor practice stemmed from denial of union membership to strikebreakers, the six-month period was counted from the date membership was denied, because this was the first date the employees could have filed their charges." *Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975) (Pet. App. A8). That the limitations period is counted from the date the violation occurs was not at issue in the enforcement proceeding below. The issue presented in the enforcement proceeding concerned when Harrisburg Drywall's refusal to bargain violation occurred. *Local 1104, Communications Workers*, simply does not address this issue.

The Court of Appeals reliance on these cases is explained by its statement in relation to the timeliness of the Keystone charges that "there does not appear to be any clear precedent on when the Section 10(b) period begins to run with respect to Section 8(a)(5) charges growing out of double breasted operations." (Pet. App. A9).

The Court of Appeals' decision overlooked several more closely analogous cases. These cases considered unfair labor practices involving contracts under Section 8(f) of the Act. 29 U.S.C. Section 158(f). Section 8(f) provides that:

> [i]t shall not be an unfair labor practice under subsections (a) and (b) of this section [29 U.S.C. Section 158] for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or . . . (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment . . .

Contracts executed pursuant to Section 8(f) are termed "pre-hire agreements." Section 8(f) was adopted in 1959. This Section was necessary because of the short duration of many building and construction industry jobs. Gorman, Basic Text on Labor Law, Unionization, and Collective Bargaining (1976). Section 8(f) allows a union and an employer to negotiate and execute a collective bargaining agreement and apply the terms of that agreement to persons subsequently employed at a new project.

The similarity between the case *sub judice* and a typical Section 8(f) contract situation is overwhelming. In a typical Section 8(f) situation the union and employer agrees that newly hired employees will be covered by the terms of the union agreement with the employer. Subsequently, the employer is awarded a contract to perform work on a new project. The employer then hires employees for that project. These employees are covered by the terms of the union agreement.

In the case *sub judice*, Western entered into a contract with ABI. This contract also bound Harrisburg Drywall if the Board and the Court of Appeals' single employer and alter ego determinations were correct. Harrisburg Drywall was then awarded the Venango County project. Western sought to apply the terms of its contract to Harrisburg Drywall's employees at the newly awarded Venango County project.

The cases interpreting Section 8(f) clearly demonstrate the analysis that should have been applied in determining when the Section 10(b) limitations period began to run with respect to Western. The basic premise of these cases is that an employer has a duty to bargain with the representative of a majority of its employees. 29 U.S.C. Section 158(a)(5), see *NLRB v. Iron Workers, Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978). Section 8(f) neither enlarges nor diminishes this duty. *Higdon Contracting Co.*, 434 U.S. 335 at 346. Where a union alleges that the employees at a new job site are covered by the terms of the union's contract with the employer, the relevant inquiry is whether the union represents a majority of employees employed at that project. *Hageman Underground Construction*, 253 N.L.R.B. No. 7 (1980), *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. No. 72 (1977), see also *Higdon Contracting Co.*, 434 U.S. 335 (1978).

The *Hageman* and *Dee Cee Floor Covering* cases are particularly instructive. Both cases involved construction industry employers. The employer in *Hageman* was a double breasted construction firm. To complete the analogy, the two companies in *Hageman* were found to constitute a single employer and one another's alter egos. In both cases, the Board was asked to determine whether the employees at a new project were covered by

the terms of an existing collective bargaining agreement. The Board's decisions in these cases placed great emphasis upon the character of the employer's workforce. Where the employer employs its workers on a project to project basis it is not obligated to adhere to the terms of a pre-hire agreement until the union demonstrates that a majority of the employees at each new job site support the union. *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. No. 72 (1977). On the other hand,

> where there is a majority status in a permanent and stable workforce, and a contract in effect between the parties covering that workforce, the union not only becomes the employees' statutory bargaining representative for all present and future sites but, as in a typical industrial setting, also enjoys an irrebuttable presumption of majority status for the duration of the agreement.

Hageman Underground Construction, 253 N.L.R.B. No. 7 (1980). This presumption of continued majority status accords with well established precedent. *Dayton Motel, Inc.*, 192 N.L.R.B. No. 112 (1971), remanded, 474 F.2d 328 (6th Cir. 1973), enforced, 525 F.2d 476 (6th Cir. 1976).

The Board's decision in the case *sub judice* included no explicit finding concerning the stability of Petitioner's workforce. The Court of Appeals' discussion of ABI and Harrisburg Drywall as a single employer indicates that a stable workforce existed (Pet. App. A19). If ABI and Harrisburg Drywall employed a stable workforce, Harrisburg Drywall, the Union was entitled to a presumption of continued majority status in the bargaining unit. *Hageman Underground Construction*, 253 N.L.R.B. No. 7 (1980). Harrisburg Drywall refused to bargain with Western concerning employment of union members at the Venango County project. This refusal

occurred in January, 1979 (Pet. App. A6). This refusal to honor the terms of the Western-CPSA contract was an actionable unfair labor practice. *NLRB v. Hyde*, 339 F.2d 568, 571-573 (9th Cir. 1965). As the Court of Appeals recognized, the Section 10(b) limitations period is counted from the first date the charge could have been filed. *Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975) (Pet. App. A7, A8). Western had a basis for filing its unfair labor practice charge in January, 1979. Western failed to file its charge until October 3, 1979. This delay renders Western's unfair labor practice charge untimely under Section 10(b) of the Act.

The timeliness of the Keystone unfair labor practice charge entails a different analysis. Keystone's knowledge of Harrisburg Drywall's operation in its jurisdictional area more than six months prior to its August 10, 1979 charge is undisputed (Pet. App. A8). The Administrative Law Judge, whose findings were substantially adopted by the Board, ruled that, despite this knowledge, Keystone's charge was timely (Pet. App. A61). The Administrative Law Judge based his decision upon a continuing violation theory. Specifically, the Administrative Law Judge ruled that Harrisburg Drywall's refusal to apply the terms of the Keystone collective bargaining agreement to its employees within the limitations period constituted an independent violation of Section 8(a)(5) of the Act. This latter refusal rendered Keystone's August 10, 1979 charge timely.

The Court of Appeals, as previously stated, recognized that there is no clear authority concerning when the Section 10(b) limitations period begins to run with respect to Section 8(a)(5) violations arising out of double breasted operations (Pet. App. A9). In rendering its decision, the Court of Appeals disregarded the parties'

citations to analogous authority and expressly disavowed any reliance upon the Board's continuing violation theory. Instead, the Court of Appeals based its decision upon its interpretation of this Court's decision in *Local Lodge No. 1424, International Association of Machinists v. NLRB*, 363 U.S. 411 (1960), and its own decision in *NLRB v. Erie Marine, Inc.*, 465 F.2d 104 (3d Cir. 1972). Petitioners respectfully submit that the Court of Appeals improperly interpreted this Court's decision in *Local Lodge* particularly in eight of the cases cited by petitioner in the Court of Appeals below.

Local Lodge presented the Court with an unfair labor practice case involving a union security agreement executed prior to the union's achieving majority support from the members of the bargaining unit. Such agreement constitute unfair labor practices. This agreement was executed more than six months prior to the filing of unfair labor practice charges with the Board. The Board argued that the continued enforcement of the clause within the limitations period, rather than the original execution of the agreement, was the basis of the charge and that therefore, the charge was timely. The Court rejected this argument and ruled that the charge was time barred.

The Court stated two reasons for its decision. One was that the enforcement of the union security clause was illegal only when viewed in light of its illegal execution. Enforcement of the union security clause, standing alone, was legal. To allow such use of remote conduct to establish the illegality of timely conduct would serve to, in effect, revive a legally defunct unfair labor practice. *Local Lodge No. 1424*, 363 U.S. 411, 417 (1960).

The second reason for the Court's decision was that the Section 10(b) limitations period would never begin if the Board's argument was adopted. *Local Lodge No. 1424*, 363 U.S. 411, 416 (1960). The conduct outside the limitations period, *i.e.* the execution of the union security agreement, was illegal. The Section 10(b) limitations period was intended to run from the date of the illegal conduct. If the period was allowed to run from the date of the continued enforcement of the clause, as the Board had argued, it would never run because the clause was always being enforced. Acceptance of the Board's argument would have negated a portion of the National Labor Relations Act by preventing the limitations period from running. The Court was able to give effect to all parts of the Act by adopting a construction that allowed the limitations period to begin. That acts should be interpreted to give effect to all their parts is a fundamental principle of statutory construction. The principle is reflected in the Court's *Local Lodge* decision.

NLRB v. Erie Marine, Inc., 465 F.2d 104 (3d Cir. 1972), presented the Third Circuit unfair labor practice charges arising from the establishment of a joint employer-employee committee. The Court of Appeals ruled that the Board's 1972 complaint was timely despite the fact that the committee was formed three years prior to the charge. The Court of Appeals' opinion purported to follow this Court's *Local Lodge* decision by ruling that conduct within the limitations period, *i.e.* maintenance of the employer-employee committee, constituted an unfair labor practice without reference to conduct outside the period. The three year hiatus between the establishment of the committee and the actual filing the committee and the actual filing of the unfair labor practice charge demonstrates that Section 10(b) was effectively removed from the Act.

That the Court of Appeals' decision had this effect, despite its attempt to adhere to the teachings of *Local Lodge*, illustrates the fact that each unfair labor practice has unique aspects. A construction of Section 10(b) which permits the limitations period to run with respect to one charge can have the opposite effect when applied to another charge.

The effect of a lengthy delay between the unfair labor practice and the charge is not particularly severe where the remedy consists, as it did in *Erie Marine, Inc.*, of a cease and desist order. A lengthy delay, or any delay, can be disasterous when the remedy involves a back pay order similar to the order entered in the case *sub judice*. The effects of such a delay are exacerbated in the construction industry where companies are forced by competitive bidding to perform work at dangerously low prices. Huge back pay awards destroy the delicate calculations upon which most bids are based. These unique aspects make Supreme Court resolution of the Section 10(b) issue in relation to Section 8(a)(5) charges growing out of double breasted operations imperative.

Petitioners respectfully submit that the Court of Appeals' decision below has the effect of removing Section 10(b) from the Act. Keystone knew of Respondents non-union operation within its jurisdiction more than six months prior to the filing of its charge. This operation constituted an unfair labor practice. The Section 10(b) period should be computed from the date the unfair labor practice occurs. *Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir. 1975). The Court of Appeals held instead that the Section 10(b) period ran from Respondents subsequent refusal to bargain. This decision prevents the Section 10(b) limitations period from beginning and is therefore,

contrary to this Court's decision in *Local Lodge No. 1424, International Association of Machinists v. NLRB*, 363 U.S. 411 (1960). The Court of Appeals' decision is even more suspect in light of the fact that the Section 10(b) period would clearly have expired had Keystone not made a subsequent request for bargaining. The Court of Appeals' decision therefore, allows a union to negate the effect of Section 10(b) by simply making a subsequent bargaining request. Petitioners respectfully submit that this decision is incorrect.

Petitioners submit that cases from several Circuit Courts of Appeal support their interpretation of *Local Lodge*. See *NLRB v. Serv-All Co.*, 491 F.2d 1273 (10th Cir. 1974); *NLRB v. McCready and Sons, Inc.*, 482 F.2d 872 (6th Cir. 1973); *NLRB v. Field and Sons, Inc.*, 462 F.2d 748 (1st Cir. 1972). In *Serv-All*, 491 F.2d 1273 (10th Cir. 1974), the tenth circuit allowed the Section 10(b) limitations period to run by holding that a refusal to sign a collective bargaining agreement within the six month period was not an independent violation of the Act where the initial refusal to sign occurred outside the limitations period. The Sixth Circuit in *McCready and Sons*, 482 F.2d 872 (6th Cir. 1973) examined an identical charge and reached the same conclusion as the Tenth Circuit. The First Circuit in *NLRB v. Field and Sons, Inc.*, 462 F.2d 748 (1st Cir. 1972) expressly based its conclusion that subsequent refusals to sign a collective bargaining agreement did not revive a time barred refusal on the need for the Section 10(b) limitations period to run.

Admittedly, certain cases cited in the Court of Appeals' opinion lead to a different conclusion. See *NLRB v. Strong*, 386 F.2d 929 (9th Cir. 1967) rev'd. on other grounds, 393 U.S. 357 (1969) [footnote omitted] *J. Ray McDermott and Co. v. NLRB*, 571 F.2d 850 (5th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978), *NLRB v. Basic*

Wire Products, Inc. 516 F.2d 261 (6th Cir. 1975); *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969). This conflict between the Circuit Courts of Appeal supplies an additional reason for this Court to grant certiorari in this case and thereby settle an important, unresolved question of federal law.

2. Refusal To Defer To The Arbitrator's Decision

Certiorari Should Be Granted To Resolve An Important Question Of Federal Law That Has Not Been Decided By This Court.

Harrisburg Drywall and Associates' liability, assuming that the unfair labor practice charges were timely, is contingent upon the Board's findings that Associates was the alter ego of Harrisburg Drywall and that Harrisburg Drywall and ABI constituted a single employer. The Board in making this determination refused to defer to the arbitrator's 1979 decision that Harrisburg Drywall was not a "subsidiary" or "joint venture" with ABI (Pet. App. A96). The Court of Appeals upheld this refusal. Petitioner respectfully submits that these decisions were incorrect. Petitioner further submits that, because of the unique nature of a double breasted construction operation, the extent to which the Board is required to defer to a contract arbitrator's decision concerning a refusal to bargain is an important question of federal law which should be decided by this Court.

Both the Board and the Court of Appeals based their deferral decisions upon *Spielberg Manufacturing Company*, 112 N.L.R.B. No. 139 (1955), and its progeny (Pet. App.). Petitioners respectfully submit that these cases are not dispositive in this instance. Petitioners further submit that, if *Spielberg* is

controlling, the Board and the Court of Appeals incorrectly applied its teachings.

This Court has recognized that Congress did not confer unfair labor practice jurisdiction upon the Board to resolve breach of contract claims. *NLRB v. C and C Plywood Corp.*, 385 U.S. 421 (1967). Resolution of breach of contract claims is instead the province of the federal district courts. *Textile Workers Unions v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Congress expressed this policy in Section 301 of the Labor Management Relations Act which provides:

> (a) [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. Section 185.

Keystone claimed that Harrisburg Drywall was obligated, by virtue of its relationship to ABI, to honor the terms of the Keystone—CPSA collective bargaining agreement. The full extent of this obligation was defined by the contract. The contract was intended to bind subsidiaries of its parties. A grievance procedure was established to resolve ambiguities in the language of the contract. By adopting this contract, the parties agreed that subsidiaries would be bound and, by negative implication, that non-subsidiaries would not be bound. Keystone's claim therefore, is purely and simply a breach of contract claim. Keystone's assertion of an unfair labor practice charge is simply an attempt to alter the terms of the agreement by expanding the definition of "subsidiary."

The arbitrator, by whose decision Keystone agreed to be bound, ruled that Harrisburg Drywall was not a subsidiary. The importance of this arbitration proceeding cannot be overemphasized. In *NLRB v. C and C Plywood Corp.*, 385 U.S. 421 (1967), this Court allowed the Board to interpret the terms of a collective bargaining agreement to determine whether the employer's unilateral wage changes constituted a failure to bargain. The contract involved in that case contained a provision which arguably allowed the employer to alter the wage rate paid its employees. Resolution of the dispute, therefore, required interpretation of the contract. This Court permitted the Board to interpret the contract only after noting that the contract did not contain an arbitration clause. *C and C Plywood Corp.*, 385 U.S. 421 (1967).

The facts of the case *sub judice* are far different. Keystone claimed that Harrisburg Drywall was obligated to honor the terms of the Keystone—CPSA collective bargaining agreement. Harrisburg Drywall's bargaining obligations were fully defined by this agreement. The contract arbitrator conclusively determined that Harrisburg Drywall was not a "subsidiary" of ABI and therefore was not bound by the contract. The determination should be regarded as a complete defense to Keystone's subsequent unfair labor practice charge. Harrisburg Drywall was permitted by the terms of the Keystone—CPSA agreement to function on a non-union basis. The Board, in the guise of an unfair labor practice proceeding, actually reinterpreted and decided a breach of contract dispute. There was no need for the Board to engage in this reinterpretation. The arbitrator had supplied the necessary interpretation. The Board, therefore, lacked jurisdiction to make its determination

and deferral was mandate by Section 301 of the Labor Management Relations Act. See *NLRB v. C and C Plywood Corp.*, 385 U.S. 421 (1967).

No Court has ruled that the extent of a non-union company's duty to bargain, where that company is a component of a double breasted operation, is defined by the union company's contract with the union so that an arbitrator's decision interpreting the reach of the contract necessarily determines the extent of the non-union company's duty to bargain. This Court should grant a writ of certiorari to resolve this important question of federal law.

Should this Court agree with the Court of Appeals that the Board's jurisdiction allowed it to determine this dispute, the Board's deferral decision should be judged by the standards established by the *Spielberg Manufacturing Company*, 112 N.L.R.B. No. 139 (1955) line of cases. These cases teach that the Board will defer if the arbitral proceeding was fair and regular, all parties agree to be bound, and the decision was not repugnant to the purposes of the Act. *Spielberg Manufacturing Company*, 112 N.L.R.B. No. 139 (1955). Additionally, the arbitrator must have considered and decided the statutory issue. See *Raytheon Co.*, 140 N.L.R.B. No. 84 (1963) enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964). The Court of Appeals based its decision on the arbitrator's failure to decide the statutory issue (Pet. App. A14). Petitioner respectfully submits that the Court of Appeals misapplied the *Spielberg* criteria.

Keystone submitted both the contract and unfair labor practice issues to the arbitrator (Pet. App. A14). The arbitrator determination that Harrisburg Drywall was not a subsidiary of ABI's operation, necessarily resolved

the statutory issue. As stated above, Keystone agreed that only signatories and their subsidiaries as defined in the contract would be bound by the Keystone—CPSA agreement. If Harrisburg Drywall was not a subsidiary, Keystone, according to the terms of its contract, relinquished any claim that Harrisburg Drywall was obligated to honor the terms of this agreement. This should provide Harrisburg Drywall with as complete a defense as was provided by the union contract in *C and C Plywood Corp.*, 385 U.S. 421 (1967). Harrisburg Drywall's duty to bargain with Keystone would therefore, coterminous with its duty under the contract. If this is an accurate appraisal of Harrisburg Drywall's duty to bargain, the arbitrator necessarily decided the statutory issue in ruling that Harrisburg Drywall was not a subsidiary. The Court of Appeals therefore, misapplied the *Spielberg* deferral standards in ruling that the arbitrator did not decide the statutory issue. This Court should grant a writ of certiorari to review the Court of Appeals' application of the *Spielberg* standards.

Conclusion

Based upon the arguments presented and the authorities cited, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

HARRY R. HARMON
Attorney for Petitioners

September 13, 1983

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit of June 30, 1983

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-3169

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION, and AL BRYANT ASSOCIATES, INC.,
Respondents.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Board Nos. 6-CA-12800, 6-CA-13716, 6-CA-13914

Argued January 13, 1983

Before: WEIS, SLOVITER and BECKER, *Circuit Judges*

(Opinion filed June 30, 1983)

Catherine Garcia (Argued)
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Appendix A—Opinion of the United States Court of Appeals for the Third Circuit of June 30, 1983.

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

I.

INTRODUCTION

The National Labor Relations Board (Board) petitions for enforcement of its order directing respondents Al Bryant, Inc. (ABI), Harrisburg Drywall and Construction Corp. (Harrisburg Drywall), and Al Bryant Associates, Inc. (Associates) to cease and desist from refusing to bargain collectively with the two charging unions, to recognize the two unions, to apply the relevant bargaining agreement terms to employees of Harrisburg Drywall and Associates, to make those employees whole for loss of earnings or compensation, to reimburse employee trust funds, and to post a specified notice.

ABI was formed by Albert Bryant in 1967 and operated as an interior design and finishing contractor, engaged in hanging drywall, installing ceilings and laying floors. During the relevant period, Bryant owned 90% of ABI and served as president; his wife owned the remaining 10% and served as treasurer. Jean Hoffman, the office manager, was the secretary. The office was located in Harrisburg, Pennsylvania in a building owned by the Bryants.

ABI was a member of the Central Pennsylvania Subcontractors Association (CPSA), which conducted labor negotiations for its employer members and which negotiated agreements with both charging unions, the United Brotherhood of Carpenters & Joiners of America, Carpenters' District Council of Western Pennsylvania (Western) and Keystone District Council (Keystone). The

two unions operate in different geographic areas. The ALJ found that ABI was bound by these agreements; this fact is apparently not disputed on appeal.

In 1971, a drywall finishing business known as Harrisburg Drywall and Construction Corp. operated by Geno Premici was incorporated and Bryant acquired 51% ownership and became vice-president and secretary. Jean Hoffman, ABI's secretary, became Harrisburg Drywall's treasurer. The following year, Bryant became sole owner. In 1975, Bryant selected Charles May, ABI's field supervisor, to be Harrisburg Drywall's president. Harrisburg Drywall did not adhere to any labor agreements in performing its work. Bryant used the two companies to maintain a "double breasted" operation, one whereby different legal entities in the construction industry with common proprietary and managerial aspects operate separately, one on a union and the other on a nonunion basis.

The third corporation, Al Bryant Associates, Inc., was formed in 1979 by Bryant, Larry McClain, ABI's coordinator, and Jean Hoffman, its office manager, after unfair labor practice charges had been filed against ABI and Harrisburg Drywall in connection with the non-union operation of Harrisburg Drywall. McClain became its president, Bryant its treasurer and vice-president in charge of sales, and Hoffman its secretary and vice-president in charge of administration. McClain and Hoffman each contributed $20,000 in cash to Associates and received 35% stock ownership. Bryant contributed all Harrisburg Drywall's stock, valued at $40,000, for 30% ownership. Associates began operating January 1, 1980, as a subcontractor in the same business as ABI and Harrisburg Drywall.

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit of June 30, 1983.

This case centers on the interrelationship between these three entities, and the legal obligations which arise as a result. The unions charged that since respondents constituted a single employer, they violated sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize the charging unions and by refusing to apply to certain Harrisburg Drywall and Associates employees the collective bargaining agreement terms applicable to ABI. The Board's order was predicated on its findings, in substantial affirmance of the rulings, findings and conclusions of the ALJ, that all three respondents were a single employer, that Harrisburg Drywall was the alter ego of ABI, that Associates was the alter ego and "disguised continuance" of ABI and Harrisburg Drywall, and that the carpenter employees of all three companies constituted an appropriate unit for collective bargaining purposes.

The enforcement petition raises the following issues: (1) Were the initial charges filed by Keystone and the charges filed by Western time-barred by section 10(b) of the NLRA? (2) Should the Board have deferred to an arbitration decision made on Keystone's charges regarding the nonunion operation of Harrisburg Drywall? (3) Does substantial evidence support the Board's findings of single employer, unit determination, and alter ego? (4) Were respondents deprived of a fair hearing due to the ALJ's conduct?

II.

TIMELINESS OF THE CHARGES

Keystone filed its initial charge with the Board on August 10, 1979 in which it complained about Harrisburg Drywall's failure to honor the Keystone collective bargaining agreement. It charged ABI and Harrisburg Drywall with committing unfair labor practices by "hiring non-Union employees in contravention of its obligation under the collective bargaining agreement" and by "having a non-Union subsidiary and refusing to recognize the Union as a representative of the employees employed by Harrisburg Drywall." Keystone filed a second unfair labor practice charge on October 6, 1980, after Associates was formed. As amended, the charge alleged the three companies had "[s]ince on or about August 1980, . . . refused to bargain collectively and in good faith with Keystone." Western filed its charge on October 3, 1979, claiming ABI "d/b/a Harrisburg Drywall" had "[s]ince on or about June 1, 1979, and at all times thereafter, . . . failed and refused to bargain collectively and in good faith with [Western]."

Respondents argue that Western's charge and Keystone's initial charge were untimely under section 10(b) of the NLRA, 29 U.S.C. §160(b), which provides "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Western knew by about January 1979, more than six months before it filed charges, that Harrisburg Drywall had been awarded a subcontract on a job in Venango County, Pennsylvania, a site within Western's geographic

jurisdiction. A representative of that union telephoned Bryant requesting employment of union personnel and Bryant refused, stating he was doing the job under Harrisburg Drywall. Respondents contend that Bryant thus "repudiated" the contractual duties with respect to employees of Harrisburg Drywall, and that the section 10(b) period began to run when the repudiation was made known to the union.

The ALJ concluded that the section 10(b) six-month period did not begin until such time as Harrisburg Drywall commenced operations under employment terms distinct from those in the union contract.[1] The ALJ found that the record did not permit finding that Harrisburg Drywall actually commenced work at the Venango County job by April 3, 1979, the section 10(b) cut-off date for Western. That work apparently commenced about June 1979.

The ALJ's conclusion that the charge was timely filed is consistent with well-established legal principles. A statement of intent or threat to commit an unfair practice does not start the statutory six months running. The running of the limitations period can begin only when the unfair labor practice occurs. Thus in *NLRB v. Plumbers & Pipe Fitters Local Union 214*, 298 F.2d 427, 428 (7th Cir. 1962), the court held that the actual date of the discharge of the nonunion employee, not the date the union demanded that he be discharged, started the

[1] The ALJ also construed a statement by Bryant to a union representative in May 1979 as conveying the possibility that there would be further consideration given to the union's demand. In light of our acceptance of the ALJ's principal grounds for finding the Western charge timely, we need not reach this additional reason.

statutory period. Similarly, when an unfair labor practice stemmed from denial of union membership to strike-breakers, the six-month period was counted from the date membership was denied, because that was the first date the employees could have filed their charge. *Local 1104, Communications Workers v. NLRB*, 520 F.2d 411, 415-16 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). Since Western had no basis for filing a charge until work on the Venango County job began, its charge was timely.

Unlike the situation with Western, the ALJ found that "Keystone was mindful that its members had been employed by Harrisburg Drywall, that Harrisburg Drywall had performed work covered by the CPSA contract, that Harrisburg Drywall had not adhered to the terms of that contract, and that Al Bryant owned Harrisburg Drywall." The Board concedes that Keystone officials were aware of Harrisburg Drywall's operation as a nonunion shop within its geographic area more than six-months before its August 10, 1979 charge was filed. The ALJ found, however, that respondents' obligation under the collective bargaining agreement was a continuing one. The fact that the initial repudiation of the agreement occurred more than six months before charges were filed did not absolve respondents from the unfair labor practices which inured from their continuing failure, on demand, to abide by the collective bargaining agreement. The ALJ found such a demand in a letter dated March 19, 1979 from Keystone informing Bryant that Harrisburg Drywall was covered by the applicable agreement and that it was obligated to adhere to its terms. Therefore, the ALJ found Bryant's failure to satisfy this demand constituted an independent violation of section 8(a)(5), thus rendering Keystone's August 10, 1979 charge timely.

As the respondents recognize, there does not appear to be any clear precedent on when the section 10(b) period begins to run with respect to section 8(a)(5) charges growing out of double breasted operations. Respondents contend that the most nearly analogous cases are those where the courts held that the refusal of an employer to execute an individual contract with the union following negotiations of a multiemployer pact marked the beginning of the six-month period. *See NLRB v. Serv-All Co.*, 491 F.2d 1273 (10th Cir. 1974); *NLRB v. McCready & Sons, Inc.*, 482 F.2d 872 (6th Cir. 1973); *NLRB v. Field & Sons, Inc.*, 462 F.2d 748 (1st Cir. 1972). *But see NLRB v. Strong*, 386 F.2d 929, 931 (9th Cir. 1967), *rev'd on other grounds*, 393 U.S. 357 (1969).[2] These cases have held a second or subsequent request by the union that the employer sign the agreement cannot support an unfair labor practice charge if the initial request and refusal to sign occurred outside the six-month statutory period. Similarly in *NLRB v. Pennwoven*, 194 F.2d 521 (3d Cir. 1952), we held that a discriminatory failure to recall employees because of their union activities initiated the six-month period. We stated that the fact that the employees wrote within the period demanding reinstatement did not trigger a new violation.

The Board, on the other hand, relies on cases holding each refusal to bargain by an employer under a general duty to bargain constitutes a separate violation. In *J.*

[2] The Board's position, which was accepted by the Ninth Circuit in *Strong*, is that a subsequent refusal to sign a labor contract within the section 10(b) period constitutes a continued refusal to bargain violation even if the initial refusal is outside the period. *See* Torrington Construction Co., 235 N.L.R.B. 1540, 1540 n.2, 1545 (1978).

Ray McDermott & Co. v. NLRB, 571 F.2d 850, 858 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978), for example, the court held that the passage of more than six months from one refusal to bargain does not bar action by the Board on a timely complaint based on subsequent refusal. The court reasoned that there was no danger of "stale" claims since a refusal to bargain violation is based on contemporaneous motives. The same principle was accepted in *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261, 267-68 (6th Cir. 1975) and *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 448-49 (4th Cir. 1969) (applied to employer's refusal to provide union with information concerning pension plan). In *NLRB v. Louisiana Bunkers, Inc.*, 409 F.2d 1295, 1299-1300 (5th Cir. 1969), a case involving a single employer, the court found the charge was timely even though the initial refusal to bargain occurred outside the six-month period, because the employer refused subsequent union requests to bargain.

A decision on how to apply section 10(b) to the facts before us must be made in light of the statute's underlying policy. The Supreme Court has described the policy of the statutory time limit "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' " and "of course to stabilize existing bargaining relationships." *Local Lodge No. 1424, International Association of Machinists v. NLRB*, 362 U.S. 411, 419 (1960) (*Bryan Manufacturing Co.*) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947)). In *Bryan* the Court interpreted this section as precluding the filing of an unfair labor charge which was grounded on events

predating the limitations period. That is not the situation before us. Here, there will be no need to rely on facts which predate the limitations period. Although there may be some evidentiary value to earlier events, this is not a situation "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice." *Bryan*, 362 U.S. at 416-17. The relevant facts will be the interrelationships of the companies at the time of a specific demand to bargain, and these operative facts in no way depend upon any earlier demand to bargain.

We find support for the Board's position in the manner in which we applied section 10(b) in our earlier opinion in *NLRB v. Erie Marine, Inc.*, 465 F.2d 104 (3d Cir. 1972). In that case, a section 8(a)(2) charge was based on a joint employee-employer committee formed in 1969. Although the complaint was not filed until July 22, 1972, we enforced the Board's order over respondent's reliance on section 10(b) because we concluded "that the principal support for the Board's findings comes from the existence of the Committee and its domination by management *within the limitations period.*" *Id.* at 108 (emphasis added).

Therefore, we believe the section 10(b) limitations period should be applied as it was in the *Erie Marine* case rather than in those cases cited by the respondents where the employer refused to sign a negotiated contract.[3] In the refusal to sign cases, the operative fact

[3] In adopting this approach, we need not rely on any continuing violation theory. *See* J. Ray McDermott & Co. v. NLRB, 571 F.2d at 858.

was a concrete act fixed in time in relationship to the facts surrounding the contract negotiations. As the court noted in *McCready*, "With the passage of time, those facts become harder to prove as memories fade and witnesses become unavailable." 482 F.2d at 875. No such concern is presented by the facts here, since the interrelationship between the entities can be established by reference to their status within the six-month period at the time of the relevant demand.[4] Here, Keystone asserted its position about Harrisburg Drywall's collective bargaining obligations in the March 19, 1979 letter. Therefore, its charge filed on August 10, 1979 was timely.

III.

DEFERRAL TO ARBITRATION DECISION

The March 19, 1979 letter to ABI by Keystone's counsel asserting Harrisburg Drywall was a "subsidiary" of or "joint venture" with ABI and that Harrisburg Drywall was obligated to apply the collective bargaining agreement negotiated between CPSA and Keystone resulted in an arbitration proceeding. Keystone presented to the arbitrator both its claim that Harrisburg Drywall, as a subsidiary of ABI, was bound to the CPSA agreement as a matter of contract and its claim that as a matter of federal labor law, the contract was binding on Harrisburg Drywall. The arbitrator found that Harrisburg Drywall was not a "subsidiary" of ABI within the meaning of the collective bargaining

[4] As the Board recognized, the remedy is to be limited to six months before filing of the charge and, as it ordered in the case of Keystone, can in no event precede the date of the demand within that period.

agreement and therefore ABI was not in violation of its contractual obligations to Keystone through Harrisburg Drywall's operation on an open shop basis. Respondents contend that the Board should have deferred to the arbitration decision denying Keystone's grievance.

Although not required to do so, *see, e.g., Herman Brothers, Inc. v. NLRB*, 658 F.2d 201, 205-06 (3d Cir. 1981); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 678-79 (2d Cir. 1971), the Board has voluntarily decided not to exercise its plenary jurisdiction over all unfair labor practice charges and to defer to outstanding arbitration awards provided certain conditions were met: the arbitral proceeding was fair and regular, all parties agreed to be bound, and the decision was not repugnant to the purposes and policies of the NLRA. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). A subsequently enunciated fourth condition, that the arbitrator must have considered and decided the statutory unfair labor practice issue, is the one at issue here. *See Raytheon Co.*, 140 N.L.R.B. 883, 884 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964).

In this case, the arbitrator specifically stated that the basic question before him was whether Harrisburg Drywall was a subsidiary under the contract. He further stated his role was "limited to interpreting [the contract terms], and it [did] not extend to enforcing the provisions of the Labor Management Relations Act."

The Board decided that deferral was unwarranted. It explained:

> The arbitrator . . . found that the NLRB and court cases cited to him by the Union were not enlightening as to the definition of a "subsidiary" and thus he relied on dictionary definitions. Based on the tenor of the arbitrator's entire decision, it is clear he did not consider the statutory issue. It is also clear that the arbitrator did not have the same evidence before him as in the instant case. For example, he had neither the employment rosters of Harrisburg Drywall nor any information that Bryant signed bids for Harrisburg Drywall.

We have recently reiterated that we review the Board's decision not to defer to an arbitration award on an abuse of discretion standard. *See United Parcel Service, Inc. v. NLRB*, No. 82-3318, slip op. at 18 (3d Cir. April 18, 1983); *Herman Brothers, Inc. v. NLRB*, 658 F.2d at 207; *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 970 (3d Cir. 1981). Respondents argue that the reasons advanced by the Board are insubstantial, and therefore it abused its discretion. Respondents rely on cases in which the Board deferred to an arbitrator's decision although the arbitrator did not explicitly resolve the statutory issue. *See Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979); *Kansas City Star Co.*, 236 N.L.R.B. 866 (1978). In those cases, the Board found the arbitrator considered all the evidence relevant to the statutory issue, and hence implicitly resolved it. In neither of those cases did the arbitrator explicitly decline to resolve the statutory issue, as he did here. Nor, in those cases, did respondents fail to provide significant relevant evidence at the time of arbitration in contrast to the situation here where, as the Board claims, "the companies refused to produce any

subpoenaed documentary evidence concerning Harrisburg Drywall during the arbitration proceeding." Brief for NLRB at 38 (citation omitted).

The requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights. *See NLRB v. General Warehouse Corp.*, 643 F.2d at 969. The Board recently reaffirmed it would not defer "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-47 (1980). Given the arbitrator's explicit statement that he was not resolving the statutory issue, and the fact that he did not have all the relevant evidence before him, we cannot hold that the Board abused its discretion in refusing to defer to the arbitral award. *See Monsanto Chemical Co.*, 130 N.L.R.B. 1097, 1099 (1961) (refused to defer where arbitrator explicitly declined to pass on statutory issue although submitted to him).

IV.

THE FINDINGS OF SINGLE EMPLOYER, UNIT DETERMINATION, AND ALTER EGO

We turn then to the respondents' challenge on the principal issue decided by the Board, which agreed with the ALJ's finding that ABI and Harrisburg Drywall were a single employer, that Harrisburg Drywall was ABI's alter ego, and that Associates was the alter ego and disguised continuance of its predecessors ABI and Harrisburg Drywall. Because of unique problems in the construction industry, the Board will accept a double

breasted operation under certain circumstances. However, an employer will be guilty of a failure to bargain violation for a double breasted operation if the Board finds that both entities are a single employer within the meaning of the NLRA and the combined employees form an appropriate bargaining unit. *See South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976) (per curiam). The bargaining unit issue need not arise when there has been an alter ego finding, at least in the situation where a successor company is the "disguised continuance" of its predecessor. In *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979), we upheld the Board's finding that a section 8(a)(5) violation could occur where a new employer was found to be the disguised continuance of the old employer without inquiring into the appropriateness of the bargaining unit. *See also Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508-09 (5th Cir. 1982) (Board will generally not consider the unit except to the extent it is repugnant to NLRA policy); Comment, *Double-Breasted Operations in the Construction Industry: A Search for Concrete Guidelines*, 6 U. Dayton L. Rev. 45, 47 (1981) (hereafter Dayton Comment).

A. *ABI and Harrisburg Drywall as a Single Employer*

Four criteria have been used by the Board in determining whether separate entities constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of*

Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam); *see also NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1121-22 & 1121 n.1 (3d Cir. 1982); *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 905 n.4 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); *Parklane Hosiery Co.*, 203 N.L.R.B. 597, 612 (1973). The Board finds no one factor controlling, although it has stressed the first three factors, particularly centralized control of labor relations, which tend to show "operational integration." *Id.; see also NLRB v. Jordan Bus Co.*, 380 F.2d 219, 222 (10th Cir. 1967); *Parklane Hosiery Co.*, 203 N.L.R.B. at 612. Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "arm's length relationship found among unintegrated companies." *Local No. 627 International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom. South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *see NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979).

The single employer question is primarily factual, and the Board's conclusion must be upheld if supported by substantial evidence. *NLRB v. Lantz*, 607 F.2d 290, 295 (9th Cir. 1979); *see Suburban Transit Corp. v. NLRB*, 499 F.2d 78, 80 n.1 (3d Cir.), *cert. denied*, 419 U.S. 1089 (1974).

In a detailed discussion of the facts, the ALJ reviewed the ample evidence of the integration of the two entities. Harrisburg Drywall shared ABI's office

building, equipment and personnel. "[T]he only assets of a corporeal nature retained by Harrisburg Drywall were a single, 1974 vintage van, and some office equipment inherited from Premici's firm. . . . Harrisburg Drywall had no warehouse, engineering, sales or clerical force, but individuals employed by ABI served the former's needs in these areas. All utility costs, including gasoline, electricity, telephones, incurred by Harrisburg Drywall and ABI were paid by ABI." There were no written agreements evidencing the "housing" arrangement or ABI's provision of equipment, administrative support and expenditures for overhead costs. Payment for rent and other overhead expenses, including headquarters' staff salaries, was made annually according to the gross volume of Harrisburg Drywall's business relative to ABI's, which the ALJ found was hardly indicative of "arm's length" dealing. The ALJ characterized Harrisburg Drywall" as a operational shell with no independent administrative capacity and little in the way of capital assets." He further stated, "this was complemented by integration of ABI resources upon the operations of Harrisburg Drywall at every level, from management to craftsmen who performed on the job site." Bryant performed many managerial functions for Harrisburg Drywall. Jean Hoffman signed checks and purchased supplies for Harrisburg Drywall. Larry McClain, ABI's coordinator, also served as Harrisburg Drywall's coordinator. Harrisburg Drywall's president, Charles May, was usually absent from the office, spending most of his time in the field supervising employees and performing carpentry tasks.

There is substantial evidence to support the ALJ's critical finding, affirmed by the Board, that the two companies shared centralized labor relations control. He found, for example, that

> the integration of the two entities is further evidenced by the frequent and seemingly at random interchange of craftsmen as between Harrisburg Drywall and ABI. In several instances, carpenters would work for both firms during the same work week. This occurred in excess of 50 times in 1979, on 30 occasions in 1978, and in excess of 80 in 1977. On at least two occasions, the same employee worked for both firms in a single day. Carpenter Gulliver testified that the only way he could tell which firm he was working for was the designation on the payroll check. The lack of separate indentity of the respective work forces of Harrisburg Drywall and ABI is indicated by the fact that in 1977, 10 of the 14 employees on the payroll of Harrisburg Drywall had also worked for ABI, in 1978, 8 Harrisburg Drywall employees had worked for ABI, while in 1979, 6 Harrisburg Drywall employees had also appeared on the payroll of ABI.

(footnotes omitted).

Respondents do not appear to seriously question the factual underpinnings which led the ALJ and the Board to conclude that ABI and Harrisburg Drywall were a single employer. Instead they argue that there is no evidence in the record to indicate that any work which was traditionally "union" work was transferred to the non-union side of the double breasted operation, and

they suggest that we should impose such a requirement before 8(a)(5) and (1) liability is imposed in double breasted cases. The Board authority upon which respondents rely, *United Constructors & Goodwin Construction Co.*, 233 N.L.R.B. 904 (1977), does not support the proposition. In the *United Constructors* case there were several factors which led the Board not to find a single employer in the double breasted context, including lack of participation of the first firm's owners in the day-to-day operation of second firm, lack of simultaneous supervision by the same personnel and use of written leases utilizing standard rates. As the foregoing discussion indicates, the ABI-Harrisburg Drywall situation presents far different facts.

We see no reason to adopt respondents' suggestion that "subterfuge" is necessary before finding that two employers are bound to each other's contracts. A contractor engaged in a double breasted operation has the best of both worlds, since it can bid through its union company when jobs require union contractors but can underbid a unionized company through its second operation on jobs that do not require union contractors. *See* Dayton Comment at 45-46. There is evidence in this case that that is precisely how Bryant used the ABI and Harrisburg Drywall companies. During the course of a meeting with union representatives Bryant stated he owned both a "union" and "open shop" company and that he would use the open shop company as "an alternative" if the unions "were going to force him to do so." Where the same employees can be and are, as in this case, switched back and forth between a union and non-union payroll, the benefits which the employees reap from the union's

collective bargaining can be diluted or dissipated. Furthermore, such an arrangement can generate confusion and disputes since the employee may be paid different wages, as occurred here, depending on which entity kept him on the payroll a particular day. The Board should be free to apply its expertise in the field of labor relations to hold that when the factual prerequisites of finding a single employer and appropriate unit are present, sections 8(a)(5) and (1) apply even without proof that union work was transferred to the nonunion side. No such requirement was suggested when the Supreme Court was presented with the single employer issue, *see South Prairie Construction Co. v. Local No. 627, supra,* and we decline to impose one.

B. *The Board's Unit Determination*

The Board recognizes sections 8(a)(5) and (1) of the Act apply to entities functioning as a single employer only if there is a finding that their aggregate employees constitute an appropriate bargaining unit. *See South Prairie Construction Co. v. Local No. 627,* 425 U.S. at 803-05; *see also NLRB v. Lantz,* 607 F.2d at 297. In this case the ALJ found that a unit consisting of the "carpenters employed by ABI and Harrisburg Drywall" was appropriate after considering "the functional integration of the operations, the similarity of the work performed and common skills of the employees, the extent of centralized management and supervision, the high incidence of temporary interchange, as well as centralized control of labor relations including the hiring and assignment of employees between jobs and firms." In affirming the ALJ's conclusion the Board also referred to the identical nature of the services provided.

The Board's determination of the scope of a bargaining unit will not be overturned by the court absent a finding "that the Board has acted in a manner that is 'unreasonable and arbitrary.' " *NLRB v. Saint Francis College*, 562 F.2d 246, 249 (3d Cir. 1977).

Respondents argue that this unit determination was inappropriate because the Board allegedly failed to follow its decision in *A-1 Fire Protection, Inc.*, 250 N.L.R.B. 217 (1980), *remanded sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982). In the *A-1* case, however, the Board had viewed the union's action in voluntarily acquiescing to the exclusion of one group of a single employer's employees from a collective bargaining agreement as a voluntary agreement on unit scope. Respondents here argue that because an agreement was negotiated with Keystone subsequent to Bryant's absorption of Harrisburg Drywall, the *A-1* case is applicable. The Board, however, distinguishes the *A-1* situation on the ground that Bryant, rather than frankly advising the union of his operation of Harrisburg Drywall at the time of the contract negotiations, instead concealed his operation and asserted that he had "nothing to do" with Harrisburg Drywall's operation and that he did not "run it." In light of this fact, the Board was not bound to find that the union "voluntarily acquiesced" in a unit determination which excluded the employees of the nonunion company.

Given our narrow scope of review over a unit determination and the substantial evidence on the record to support the Board's finding of an appropriate unit, we find no basis to overturn its conclusion that ABI and

Harrisburg Drywall violated sections 8(a)(5) and (1) by failing to recognize the charging unions and failing to apply the negotiated agreements to the combined employees.[5]

C. *Associates as an Alter Ego*

Respondents argue that the Board's finding that Associates was the alter ego of ABI and Harrisburg Drywall is not supported by substantial evidence. "[T]he focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d at 508; *see also* Comment, *Dual Companies—When Does a Union Have the Right to Expanded Representation?*, 12 U.S.F. L. Rev. 89, 93 (1977).

Like the single employer finding, the finding that one company is the alter ego of another is a question of fact. *See Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). The factors to which the Board looks are the substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old and new corporations. *See Carpenters Local Union No. 1846*, 690 F.2d at 507. There is substantial evidence to support the finding that

[5] Since we find there was substantial evidence to support the Board's conclusions that ABI and Harrisburg Drywall were a single employer and that the bargaining unit was appropriate, we need not reach its finding that Harrisburg Drywall was ABI's alter ego.

Associates is the alter ego in disguised continuance of ABI and Harrisburg Drywall. Associates was created to perform the same kind of work as ABI and Harrisburg Drywall. It occupied the same building, and shared some areas of its office and warehouse. It assumed the utility bills previously paid by ABI, rented ABI's office furniture, equipment and scaffolding, and employed substantially unchanged ABI staff. Five of the six nonmanagerial headquarters employees who had worked for ABI were transferred to Associate's payroll in the first week of its operation and the sixth was transferred shortly thereafter. Associates took its initial field staff from the other companies. ABI's three managers were transferred to Associates' payroll and continued to perform similar managerial functions in that capacity. Furthermore, it is significant, if not crucial, that Associates was created after the filing of unfair labor practice charges against ABI and Harrisburg Drywall, and substantial evidence supports the ALJ's finding that it was a "disguised continuance . . . through which contractual obligations to Keystone and Western and putative statutory remedies were to be avoided." As the ALJ found, Associates

> was formed with knowledge of the labor difficulties and unfair labor practice charges confronting ABI and Harrisburg Drywall, and continued with an identical business purpose and objective. Administrative, managerial, sales, engineering, warehousing and clerical employees were simply removed from the payroll of one firm one day and appeared on the payroll of the other the next. For the first 5 months of its existence, [Associates] drew

exclusively from the Harrisburg Drywall blue collar work force. Like Harrisburg Drywall, it utilized the equipment of ABI and shared administrative and clerical support with that firm.

Respondents dispute the characterization of Associates as the alter ego of the other two companies principally by objecting to the ALJ's finding that Bryant "continued to function as the principal source of [Associates"] policy and executive authority." This finding was based in part on the ALJ's credibility determination. In addition, there was evidence that Bryant spent up to five days a week in the joint ABI/Associates offices, that ABI's activities were practically at a standstill, that Bryant was frequently "consulted" about Associates' business, that Bryant's salary under a "consulting agreement" with Associates was twice that of its president, and that he exercised some supervision over sales personnel. This evidence supports the finding that Bryant retained sufficient control over the affairs of Associates to meet the alter ego criteria applied by this court in *NLRB v. Scott Printing Corp., supra.* As we indicated earlier, it is unnecessary to embark on a unit determination analysis once there is adequate evidence to support the finding that Associates was the alter ego of the other two companies.

Since we find that there was substantial evidence to support the Board's findings that ABI and Harrisburg Drywall were a single employer, that their carpenter employees constituted an appropriate bargaining unit, and that Associates was the alter ego of the other two companies, it follows that the Board's finding that respondents violated sections 8(a)(5) and (1) of the Act was proper.

V.

THE ALJ'S CONDUCT

The respondents' claim that the ALJ's conduct deprived them of a fair hearing. They complain that he evidenced hostility to Bryant and his attorney, that he seemingly had prejudged issues before all the evidence was in, and that he took on the qualities of an advocate in his examination of witnesses.

The Board considered this claim and concluded that, "[w]hile we believe some of the statements made by the Administrative Law Judge at the hearing may have been ill-chosen; upon our full review of the record and the Decision of the Administrative Law Judge, we perceive no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, and prejudice toward Respondents' counsel." The Board found no evidence of partiality in the ALJ's examination of respondents' witnesses or in his analysis and discussion of the evidence. The conduct of the ALJ did not in all instances project the image of a patient, impartial adjudicator. Nevertheless, the record does not establish that the respondents failed to receive a fair hearing.

VI.

CONCLUSION

For the foregoing reasons, we will grant the Board's application for enforcement of its order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Opinion of the National Labor Relations Board of February 11, 1982.

260 NLRB No. 10

FJZ
D—8480
Harrisburg, PA

UNITED STATES OF AMERICA

Before The National Labor Relations Board

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION, AND AL BRYANT ASSOCIATES, INC.

(Case 6—CA—12800)

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, CARPENTERS' DISTRICT COUNCIL OF WESTERN PENNSYLVANIA, AFL-CIO

and

KEYSTONE DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL—CIO

(Cases 6—CA—13716 and 6—CA—13914)

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

DECISION AND ORDER
ENTERED FEBRUARY 11, 1982

On July 27, 1981, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL—CIO, filed exceptions and a brief in opposition to exceptions filed by Respondents.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

[1] Respondents except to the Administrative Law Judge's Decision as being tainted with bias, hostility, and prejudice. We find these allegations to be without merit. While we believe some of the statements made by the Administrative Law Judge at the hearing may have been ill-chosen, upon our full review of the record and the Decision of the Administrative Law Judge, we perceive no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, and prejudice towards Respondents' counsel. We further find no evidence of partiality in the Administrative Law Judge's examination of Respondents' witnesses or his analysis and discussion of the evidence. Given this ruling, we deny Respondents' request for the Board to listen to the tapes of this proceeding.

At fn. 2 of his Decision, the Administrative Law Judge admonished Respondents' counsel for moving the Administrative Law Judge to recuse himself in their post-hearing brief rather than before the "appropriate reviewing authority." The Administrative Law Judge

(Footnote continued on following page)

(Footnote continued from preceding page)

erred. Sec. 102.37 of the Board's Rules and Regulations requires the party requesting an administrative law judge to disqualify himself to do so before the administrative law judge files his decision. Further, Sec. 102.41 of the Board's Rules and Regulations provides that an objection to the conduct of the hearing may be included in the record.

Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's finding that ABI and Harrisburg Drywall are single employers under the Act. We further agree that the employees of ABI and Harrisburg Drywall constitute an appropriate unit. However, we do so solely because these employees share a sufficient community of interest based on the following findings: The firms provide subcontracting services of an identical nature in a segment of the construction industry; the employees perform similar work and possess common skills; the management, supervision, and control of labor relations of the employees is centralized; and there is a high incidence of temporary interchange of employees between the two firms.

We agree with the Administrative Law Judge that deferral to the arbitrator's award which was introduced into evidence is inappropriate in the instant case. In so doing, we find that the arbitrator expressly declined to resolve the statutory issue before us. Thus, in his decision the arbitrator expressly stated that the "basic question before the Arbitrator is whether Harrisburg Drywall is a 'subsidiary' or 'subsidiary building construction company' of Al Bryant Inc. . . ." within the intendment of the contract. He specifically stated that his role was limited to interpreting the terms of the agreement and did "not extend to enforcing the provisions of the Labor Management Relations Act." The arbitrator then found that the NLRB and court cases cited to him by the Union were not enlightening as to the definition of a "subsidiary" and thus he relied on dictionary definitions. Based on the tenor of the arbitrator's entire decision, it is clear he did not consider the statutory issue. It is also

(Footnote continued on following page)

(Footnote continued from preceding page)

clear that the arbitrator did not have the same evidence before him as in the instant case. For example, he had neither the employment rosters of Harrisburg Drywall nor any information that Bryant signed bids for Harrisburg Drywall.

Having found for the above reasons that deferral is unwarranted, we find it unnecessary to pass or rely on the Administrative Law Judge's discussion and conclusion that the arbitrator's decision was repugnant to the policies of the Act.

[3] In "The Remedy" section of his Decision, the Administrative Law Judge recommended that Respondents be ordered to apply their collective-bargaining agreement with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO (Western) "retroactively without time limit . . . ." However, our normal remedy for violations of this nature is limited to the 10(b) period. We see no reason to extend the remedy beyond that period in this case. Accordingly, we shall order Respondents to apply their collective-bargaining agreement with Western retroactive to April 3, 1979, the beginning of the 10(b) period.

The Administrative Law Judge also recommended that Respondents be ordered to reimburse the trust funds provided for in the collective-bargaining agreements and to remit contributions it failed to make on behalf of unit employees of Harrisburg Drywall and Al Bryant Associates "with interest." Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondents must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., Harrisburg, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 2(a), (c), and (d):

"(a) Recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the aforesaid unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and apply the terms of the appropriate collective-bargaining agreement negotiated by CPSA and said labor organization retroactive to April 3, 1979."

"(c) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL—CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the

collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees, in the manner set forth in the section of this Decision entitled 'The Remedy,' as modified.

"(d) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, whole for any loss of earnings or other compensation they may have been denied since April 3, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees in the manner set forth in the section of this Decision entitled 'The Remedy,' as modified."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. February 11, 1982

_____

John H. Fanning, Member

_____

Howard Jenkins, Jr., Member

_____

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, as the exclusive representative of our employees in the appropriate unit described below by refusing to recognize and to apply the terms of the applicable collective-bargaining agreement with said labor organization to employees of Harrisburg Drywall and Construction Corporation. The appropriate unit is:

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

All journeyman carpenters, layout men, and apprentices employed within the geographic jurisdiction of United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, by employer members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL—CIO, as the exclusive representative of our employees in the appropriate unit described below by refusing to recognize and to apply the collective-bargaining agreement with said labor organization to employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc. The appropriate collective-bargaining unit is:

All journeyman carpenters, layout men, and apprentices employed within the geographic jurisdiction of Keystone District Council of United Brotherhood of Carpenters and Joiners of America, AFL—CIO, by employer-members designating the Central Pennsylvania Subcontractors Association as their bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act.

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the appropriate collective-bargaining unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and WE WILL apply the collective-bargaining agreement with said labor organization to those employees of Harrisburg Drywall and Construction Company, retroactively to April 3, 1979.

WE WILL recognize Keystone District Council of United Brotherhood of Carpenters and Joiners of America, AFL—CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and WE WILL apply the collective-bargaining agreement with said labor organization to such employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., retroactively to March 19, 1979.

WE WILL jointly and severally make our employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates,

Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL—CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which we have failed to make on behalf of said employees.

WE WILL jointly and severally make our employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL—CIO, whole for any loss of earnings or other compensation they may have been denied since April 3, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which we have failed to make on behalf of said employees.

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION AND AL BRYANT, ASSOCIATES, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

Appendix A—Opinion of the National Labor Relations Board of February 11, 1982.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, PA 15219, Telephone 412-644-2969.

Opinion of the Administrative Law Judge of July 27, 1981

JD-359-81
Harrisburg, PA

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Division of Judges

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION, and AL BRYANT ASSOCIATES, INC.,

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, CARPENTERS' DISTRICT COUNCIL OF WESTERN PENNSYLVANIA, AFL-CIO,

KEYSTONE DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.

Case Nos. 6-CA-12800
6-CA-13716
6-CA-13914

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

Matthew M. Franckiewicz, Esq., of Pittsburgh, PA, for the General Counsel.

Thomas A. Beckley, Esq. and *Joseph Rose, Esq. (Beckley & Madden)*, of Harrisburg, PA, for the Respondent.

Ronald L. Gilardi, Esq. (Gilardi & Cooper), of Pittsburgh, PA, on behalf of United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO.

Ira H. Weinstock, Esq., of Harrisburg, PA, on behalf of Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(Entered July 27, 1981)

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by the undersigned in Harrisburg, Pennsylvania, on December 10, 11, 12, 1980, and January 28 and 29, 1981, upon an initial unfair labor practice charge filed on August 10, 1979 in Case No. 6-CA-19417, and further charges, resulting in separate complaints, alleging that Respondents violated 8(a)(1) and (5) of the Act by refusing to recognize the Charging Parties and to apply the terms of the latter's subsisting collective bargaining agreements to employees of Harrisburg Drywall and Al Bryant Associates.[1] In its answers, Respondents denied that any unfair labor practices were committed, and set forth certain affirmative defenses. Following close of the hearing,

[1] The original complaint in Case No. 6-CA-12800 issued on May 30, 1980, was amended on September 26, 1980, and was again amended on November 24, 1980. The original complaint in Case No. 6-CA-13716, was issued under Case No. 4-CA-10437, on April 30, 1980, and after transfer to Region 6 of the National Labor Relations Board, was amended on September 26, 1980, and joined with Case No. 6-CA-13914 in a second amended complaint, which issued on November 21, 1980. The above proceedings were consolidated by an initial Order dated August 20, 1980 and a further Order consolidating cases issued on November 21, 1980.

briefs were filed on behalf of the Respondents,[2] the General Counsel, and the Charging Parties.

Upon the entire record in this proceeding,[3] including direct personal observation of the witnesses while testifying and their demeanor, and after consideration of the post-hearing briefs, it is hereby found as follows:

---

[2] Respondents, on December 10, 1980, at the close of the first day of the hearing, charged the undersigned with assuming the role of an advocate and conducting himself in a manner manifesting a lack of impartiality. At that time, and again in response to a "Motion to Recuse" which was made at the outset of the continued hearing on December 11, 1980, the undersigned responded on the record to the accusations and charges made by co-counsel for the Respondents. The aforesaid motion was denied. Respondents' post-hearing brief to the undersigned includes some 15 pages iterating its position that the undersigned denied Respondents a fair and impartial hearing. Curiousity is aroused that such a tact would be adopted, and such matters addressed to the undersigned directly at a time when he is considering the merits, rather than the more appropriate and relevant course of deferring such matters to the appropriate reviewing authority.

[3] Separate motions to correct the official stenographic transcript filed, respectively, on behalf of the General Counsel and Respondents are granted but only as set forth below:

Page	*Line*	*Delete*	*Substitute*
59	8	point	form
70	15	Blue League's	Prevailing Wage
87	5,8	Sebostas	Sebacious
98	20	carpenter	clerical
161	25	did	didn't
197	5	plaintiff	Respondent
208	4	partial	impartial
216	12	sworn	suborning
224	4	conception	inception
256	14	interim	written
327	19	cauctuous	
408	21,24	Gym	Gem
440	9	person	personally
498	22	represented as	
654	22	Bond	Baum
655	19	W.B.	Willoughby

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

Findings of Fact

I. Jurisdiction

Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc., are Pennsylvania corporations, engaged in the construction of ceilings, floors and drywall, with their principal office and place of business located at 2311 Hummingbird Lane, Harrisburg, Pennsylvania. It is alleged by the General Counsel that the foregoing, at all times material, have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities, have provided services for each other; and have interchanged personnel with each other;[4] and that, as such, they "... constitute a single integrated business enterprise and a single employer within the meaning of the Act."

At the hearing it was stipulated that in the course and conduct of said operations, services valued in excess of $50,000 were performed by Harrisburg Drywall in 1979, a representative period, for the Commonwealth of Pennsylvania. It further was stipulated that the Commonwealth of Pennsylvania annually purchases goods and services exceeding $50,000 from sources beyond said Commonwealth.

The jurisdictional issue, as it affects Respondents, being predicated solely upon facts pertaining to

[4] See General Counsel Exhibit 1(tt).

Harrisburg Drywall, depends vitally on the alleged single employer status of all three firms. That issue is also critical to the refusal to bargain allegations pertaining to Harrisburg Drywall and Al Bryant Associates. The latter, having been treated in subsequent sections of this Decision, and it having been concluded that consistent with the allegations in the relevant complaints, that these three firms constitute a single integrated enterprise and a single employer for purposes of the Act, I find that Respondents are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The complaints allege, the parties at the hearing stipulated, and I find that United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, herein called Western, and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Keystone, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Preliminary Statement

This consolidated proceeding once again raises questions concerning the propriety under the Act of so-called "double breasted" operations in the construction industry, whereby distinct legal entities with common proprietary and managerial attributes function separately, with one utilized exclusively on a union basis

and the other, or others, nonunion. The central figure in this inquiry is Albert Bryant, who apparently, for a number of years, has been a factor in the drywall, ceiling and flooring industry in Pennsylvania. The General Counsel claims that Al Bryant, Incorporated, herein referred to as ABI, a firm owned wholly by Bryant and his wife, was party to collective bargaining agreements covering "carpenters" negotiated between the Central Pennsylvania Subcontractors Association, herein called CPSA, and Keystone and Western, respectively. ABI was at all times material a contractor engaged in construction of ceilings, floors and drywall and functioned as a "union contractor" paying union scale and fringes and honoring the terms of applicable collective bargaining agreements with Keystone and Western. On behalf of the General Counsel, it is further asserted, that Bryant utilized separate corporations: namely, Harrisburg Drywall Construction Corporation, herein call Harrisburg Drywall, and commencing on January 1, 1980, Al Bryant Associates, Inc., herein called ABA, to bid on and perform identical construction work, on a non-union or open shop basis. It is claimed that ABA and Harrisburg Drywall, together with ABI, constitute a single integrated enterprise with ABI, that all three were therefore, through ABI's membership in CPSA and the latter's authority to negotiate on behalf of ABI, bound to CPSA's contracts with Keystone and Western.

Respondents, by way of defense raise a myriad of procedural and substantive issues. It is asserted that inasmuch as Keystone and Western both acquired knowledge that Harrisburg Drywall and ABA were

functioning on a non-union basis more than six months prior to the filing of any unfair labor practice charge, the complaints issued on their behalf were time-barred by virtue of Section 10(b) of the Act. Furthermore, in connection with the claims registered on behalf of Keystone, Respondents point to the fact that the issue of whether Harrisburg Drywall was bound to any agreement with that labor organization was submitted to arbitration in 1979, with a hearing held before Arbitrator James M. Harkless, on July 6 and 7, 1979, wherein the Union's grievance in quest of such determination was denied. On behalf of Respondents, it is asserted that said award is entitled to binding force pursuant to the *Spielberg* doctrine.[5]

With respect to the merits, Respondents deny that ABI was ever bound as a signatory or party to any agreement reached between CPSA and Keystone and Western. It is further asserted, again in the alternative, that ABI, Harrisburg Drywall, and ABA, were independent firms, having independent existence, and lacking in any interrelationship which would confer single employer or alter ego status so as to permit enforcement of the National Labor Relations Act in a manner which would deem them responsible for any agreements reached by ABI.

B. Background

ABI was formed in 1967 by Albert Bryant. Since its inception, Albert Bryant has owned 90 percent of its stock, and his wife Marjorie, the remaining 10 percent.

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[5] *Spielberg Manufacturing Company*, 112 NLRB 1080.

At times material, that firm maintained its principal offices at 2311 Hummingbird Lane, Harrisburg, Pennsylvania, and functioned as a *union* contractor engaged in the hanging of drywall, the insulation of ceilings, and the laying of floors.

Insofar as the instant record discloses, the relationship between ABI and the Carpenters' Union dated back to 1972, when an agreement was signed, at the request of Al Bryant, with the International Brotherhood of Carpenters. That document provided as follows:

Agreement

AGREEMENT between AL BRYANT INC herein referred to as the Company, and the United Brotherhood of Carpenters and Joiners of America.

The Company agrees to recognize the jurisdictional claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and fringe benefits and observe the lawful working conditions (including lawful union shop agreements) established or agreed upon by the United Brotherhood of Carpenters and Joiners of America and the recognized agency of the locality in which any work of the Company is being done, with respect to journeymen carpenters employed by the Company.

No change is to be made in the hours, wages and other conditions established or agreed upon in any locality.

The Company will not subcontract any work within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America which is to be performed at the job site except to a contractor who holds an agreement with the United Brotherhood of Carpenters and Joiners of America or one of its subordinate bodies, or who agrees in writing, prior to or at the time of the execution of his subcontract, to be bound by the terms of this Agreement.

In consideration of the foregoing the United Brotherhood of Carpenters and Joiners of America agrees to furnish competent journeymen selected for reference to jobs upon a non-discriminatory basis, such furnishing to be made upon request of the Company and with the Company retaining the right to reject or accept the applicants for employment.

The United Brotherhood of Carpenters and Joiners of America agrees that the District Council or Local Unions having jurisdiction in the respective areas of the performance of work will maintain appropriate non-discriminatory facilities for the registration and referral of persons possessing the skills required for the performance of work by the Company. The Company agrees to use said facilities in filling job vacancies on all projects.

In the event that no such facilities are maintained or that the facility maintained is unable to fill requisitions for employees within a 48-hour period, the Company may employ applicants directly at the job site on a non-discriminatory basis. In such event the Company will notify the union of the names and classifications and the dates of such hirings.

There shall be no strike or lockout pending any dispute being investigated and all peaceable means taken to bring about a settlement.

The Company will post in places where notices to employees and applicants for employment are customarily posted all of the provisions relating to the above hiring arrangements.

COMPANY:

AI BRYANT, INC.

By [s]

Albert I. Bryant
President

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

By [s]

General President

Prior thereto, a sole proprietorship, Harrisburg Drywall & Construction, was operated in the same field by an individual, Geno Premici. The latter, through his firm, had been engaged in drywall insulation and finishing on a non-union basis. At some point, Premici sought Bryant's assistance with his financial problems. In consequence, in 1971, Harrisburg Drywall was incorporated, with Bryant retaining control, as majority stockholder, and Premici becoming president and remaining the principal functionary of the business. Premici's association with the new corporation lasted only about a year and in 1972, his stock was redeemed by Harrisburg Drywall and Al Bryant retained ownership of all outstanding shares. Commencing in 1972, ABI, which had leased space at 2311 Hummingbird Lane, from Al Bryant and his wife, subleased space to Harrisburg Drywall.[6] Later, Al Bryant, apparently designated Charles May to be president of Harrisburg Drywall in November 1975. Bryant became vice-president of that firm and its secretary. Harrisburg Drywall at no time signed any agreement or authorized any entity to negotiate with the Carpenters Union or its affiliates on behalf of its employees. Harrisburg Drywall engaged in the same construction activity as ABI but operated on a nonunion, open shop basis.

In addition to the international agreement, considerable evidence was adduced reflecting upon ABI's obligations pursuant to agreements negotiated by CPSA with Western and Keystone, respectively. Apparently, in 1974, another employer association, Keystone Building Contractors Association, herein called KBCA, jointly

[6] As there was no written lease between ABI and Harrisburg Drywall this apprently was pursuant to verbal understanding.

with CPSA, negotiated a collective bargaining agreement with Keystone for a term running from May 1, 1974 through April 30, 1977.[7] Prior to expiration, that agreement was supplemented on April 18, 1977, by agreement between Keystone and CPSA and extended for a term May 1, 1977 through April 30, 1982.[8] ABI was a member of CPSA, and Al Bryant was at the time of the hearing, and for many years before, a director of that Association. Indeed, when the 1977 supplement was negotiated, Al Bryant was both the president of CPSA and the sole spokesman and negotiator for CPSA and it was Bryant who executed that document on behalf of CPSA. Notwithstanding Al Bryant's involvement in the 1977 negotiations it is contended that ABI was at no time bound by the results of multi-employer negotiations for "carpenters."[9]

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[7] See General Counsel Exhibit 4.

[8] See General Counsel Exhibit 5.

[9] The enabling rules of CPSA were not introduced. However, parole testimony was offered to the effect that employer-members of CPSA are not bound to collective bargaining agreements negotiated by said Association absent prior, written authorization to that effect. Apparently because of differences between the strict carpentry craft and the work of "floor layers", a separate agreement is negotiated by CPSA for "floor layers." The dispute in this case centers upon members of the carpentry craft rather than floor layers. ABI concedes that CPSA was authorized to bargain on its behalf with respect to the floor layers, and that it was bound to CPSA's contract covering them. ABI denies that it had effected such an authorization with respect to the "carpenters".

Like Keystone, Western had also negotiated a series of contracts with CPSA. In the 1975 negotiations, Nancy Linn Shaffer was the chief spokesman for CPSA. She furnished Western with a list of employers for whom CPSA was authorized to negotiate. That list included ABI.[10] Three years later, and 1 year after Bryant negotiated the 1977 supplement with Keystone, Western in 1978, commenced contract renewal negotiations with CPSA. Orin Remsnyder was the chief spokesman for the latter. At the outset of said negotiations, Western requested and Remsnyder provided a list of contracting employers. Once more, the list included ABI.[11]

While the 1977 Keystone supplement and the 1978 agreement with Western were in effect, ABI adhered to the terms thereof when operating within the geographic jurisdiction of each of these respective labor organizations. Harrisburg Drywall operated non-union and failed to honor said agreements.

Beginning in 1977, Keystone began to receive complaints from carpenters employed by Harrisburg Drywall concerning their retention at less than union scale. However, no legal recourse was sought until March 19, 1979 when Keystone filed a grievance against ABI under the basic agreement, seeking to bind Harrisburg Drywall to the terms of the subsisting agreement. Arbitrator Harkless, issued his award on October 29, 1979, denying Keystone's grievance.

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[10] See General Counsel Exhibit 25.
[11] See General Counsel Exhibit 496.

While the proceeding before the arbitrator was pending, unfair labor practice charges were filed on August 10, 1979, by Keystone in Case No. 4-CA-10417,[12] charging ABI with 8(a)(1), 8(a)(3) and 8(a)(5) violations for utilizing a non-union subsidiary and refusing to recognize the Union as representative of the employees employed by Harrisburg Drywall. On October 3, 1979, in Case No. 6-CA-12800, similar charges were filed by Western in connection with Harrisburg Drywall's performance of a job in Venango County, Pennsylvania.

During the pendency of these charges, but prior to the issuance of complaints thereon, a third corporation, ABA, was formed. This time Al Bryant relinquished ownership control. Thus, ABA was capitalized on the basis of Bryant's contribution of all of the outstanding stock of Harrisburg Drywall, and the contribution of $20,000 cash by Jean Hoffman, and Larry McClain.[13] Al Bryant's interest in ABA was that of a 30 percent shareholder. He held the offices of vice-president in charge of sales and treasurer. Hoffman and McClain each retain 35 percent of the remaining outstanding shares.

ABA beginning in 1980, like ABI and Harrisburg Drywall operated as a contractor engaged in the construction of ceilings, floors and drywall. As was true of Harrisburg Drywall, ABA function exclusively on a open shop non-union basis and did not adhere to the CPSA bargaining agreements.

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[12] By action of the General Counsel on August 15, 1980, Case No. 4-CA-10417 was transferred to Region 6 of the National Labor Relations Board and redesignated Case No. 6-CA-13716.

[13] Hoffman and McClain at the time were key employees of ABI. In addition, Hoffman was an officer and director of both ABI and Harrisburg Drywall.

Thereafter, on October 6, 1980, an unfair labor practice charge implicating ABA was filed by Keystone in Case No. 6-CA-13914. The charges, as amended, alleged, *inter alia*, that ABI, ABA, and Harrisburg Drywall refused to bargain with Keystone as representative selected and designated by an employee majority.

C. Concluding Findings

1. The 10(b) Issue.

The threshold question is whether the 10(b) defense was raised by Respondents in timely fashion. Respondents failed to affirmatively raise the 10(b) defense in its various answers. It nevertheless sought dismissal on that ground prior to the conclusion of the General Counsel's case. Based thereon, at that time, the General Counsel and Charging Parties were apprised by the undersigned that they would be afforded latitude in meeting that defense during the hearing. Accordingly, any possible prejudice in consequence of belated injection of the 10(b) issue was removed, and the undersigned ruled that the defense was viable and a proper subject for litigation.[14]

[14] Having ruled in Respondents' favor in this regard, Respondents later moved to amend its answers to this effect. The undersigned ruled that such action was unnecessary, as a matter of substance, in view of the ruling set forth in the above text and also improper in the circumstances. Respondents also contended that under the Federal Rules of Civil Procedure, pleadings may be amended to conform with respect to issues tried "by express or implied consent of the parties . . .". In this respect, Respondents rely on the fact that as evidence supporting the 10(b) defense was elicited without objection by either the General Counsel or Charging Parties, this constitutues "implied consent." Although the issue need not be reached, I find no merit in this view. I am not convinced that the facts in question were introduced under conditions conveying knowledge, appreciation, understanding, or suspicion, that they might be seized upon later to support the 10(b) defense.

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

The General Counsel and Charging Parties seek reconsideration of this ruling. However, contrary to their view, those asserting the 10(b) defense assume no obligation that it be pleaded affirmatively. It is sufficient that the matter be raised in timely fashion. See e.g., *Vitronic Division of Penn Corporation*, 239 NLRB 45. In this instance, the matter was raised at a time and under conditions which permitted litigation of the matter without prejudice to the parties, and without undo prolongation of the proceeding. The ruling made in this regard at the hearing is reaffirmed.

Section 10(b) of the Act precludes the maintenance of a complaint upon conduct occuring "more than six months prior to the filing of the charge." Harrisburg Drywall plainly was engaged in operations well in advance of the 10(b) period. However, the onus was upon Respondents to demonstrate that the Charging Parties were aware that ABI was engaging in actionable conduct through Harrisburg Drywall more than 6 months before the filing of the charges herein. In this connection, undenied evidence establishes that Harrisburg Drywall was operating non-union and that Keystone was aware Western suspected this fact more than 6 months before filing the charges that formed the predicate for this proceeding. Thus, with respect to Keystone the initial charge herein was filed on August 10, 1979. Robert Getz, the secretary-treasurer of Keystone, testified in the arbitration proceeding on July 6, 1979, that in 1977, a union member, Ortega, complained about wages he was receiving from Harrisburg Drywall and that Bryant was

operating an open shop.[15] Getz acknowledged that this was confirmed through his investigation in January 1979 of health and welfare records reflecting contributions of union members that he knew to be working full-time under Bryant's aegis but were not receiving full-time credits. He further testified that on questioning the members as to the amount of hours they were working, he learned that they had been working part-time for Harrisburg Drywall.[16]

With respect to Western, the initial unfair labor practice charge was filed on October 3, 1979. Insofar as this record discloses, Western acquired knowledge of Harrisburg Drywall in connection with a subcontract awarded by the State of Pennsylvania to that firm on the Polk Center located in Venango County, Pennsylvania, a site within the geographic jurisdiction of the latter. Respondents point to the testimony of George Garfield, a business representative of Western in this connection. Garfield testified that he noticed from a "Dodge Report"[17] that Harrisburg Drywall had the job at Polk. He telephoned the number appearing and the person answering the phone identified himself as Al Bryant.

[15] In addition to the foregoing, Richard W. Martz, a business agent for Keystone testified before the arbitrator on July 6, 1979 that he first learned that Bryant was operating two shops when Ortega registered his complaint in 1977.

[16] George Gulliver, the son-in-law of Getz, testified that he was hired by ABI in August 1978 and further confirmed that on November 19, 1978, after receiving his first paycheck from Harrisburg Drywall, he informed Getz that he had worked for Harrisburg Drywall, and that from this discussion, it was evident that Getz already knew that Harrisburg Drywall was non-union.

[17] The "Dodge Report" is a publication, identifying contractors and subcontractors on contracts let in the construction industry.

Bryant was asked if he would need union personnel on the job, and replied that he would not, because he was doing the job under Harrisburg Drywall. Garfield indicated that the job should be performed under Western's contract with CPSA. According to Garfield, Bryant did not "seem to agree." According to Garfield, it was not until June 1979, and subsequent to this conversation that work on the Polk Center job actually commenced. On cross-examination, Garfield placed the telephone conversation with Bryant as preceding visits to the job site which occurred approximately in January 1979.

Garfield's testimony must be considered together with that of Robert Argentine, Western's executive manager. Argentine testified that Garfield reported that the Polk job was being performed by Al Bryant doing business as Harrisburg Drywall. Because Argentine was informed by Garfield that "he hadn't been able to do much with him . . ." toward the end of May, on or about May 23, 1979, he spoke with Bryant on the telephone. Argentine advised that he expected him to honor the contract at Polk Center and was informed that Bryant had let the job to Harrisburg Drywall. Argentine expressed that this was in violation of the contract, and threatened to "push it to any extreme . . . to see that our contract was enforced." When Argentine observed that the prevailing rate had to be paid on the job anyway, and appealed that it be performed consistent with the contract, Bryant allegedly responded "I'll get back to you." Bryant never again contacted Argentine, who prior to the filing of the charges made several unsuccessful attempts to reach Bryant.

With respect to Western, the evidence does not substantiate that the latter was apprised of actionable unfair labor practice until within the 10(b) period. The 10(b) cut-off date with respect to this Charging Party was April 3, 1979. The record does not permit a firm finding that Harrisburg Drywall commenced work at the Polk job as of that date. Obviously, no arguable unfair labor practice would inure until such time as Harrisburg Drywall commenced operations under employment terms distinct from those in the CPSA contract with Western. The declaration by Bryant of his intention to perform that job on a non-union basis was not an actionable unfair labor practice and hence did not activate the 6-month limitation.[18] Furthermore, the indication by Bryant in the May telephone conversation with Argentine that he would get back to him, at a very minimum, conveyed to Western the possibility that there would be further consideration of its demand with respect to the Polk job. In sum, it is concluded that Respondent has failed to meet its burden of proving that Charging Party Western was put on notice of any unfair labor practices committed by ABI through Harrisburg Drywall on or before April 3, 1979.

Unlike the situation with Western, however, it is clear that Harrisburg Drywall had performed on a non-union basis within the geographic jurisdiction of Keystone and that Keystone representatives were aware thereof, more than 6 months prior to the filing of its unfair labor practice charge. In the face of the foregoing, the General Counsel contends that Section 10(b), nonetheless, does

[18] See e.g., *City Roofing Co.*, 222 NLRB 786, ftn. 1 and *California School of Professional Psychology*, 227 NLRB 1657, ftn. 1.

not constitute a substantial defense, inasmuch as the violation was a continuing one, and (2) the facts within Keystone's knowledge did not constitute clear an unequivocal notice, inasmuch as Keystone was not aware of all the elements establishing that Harrisburg Drywall and ABI constituted a single employer, and indeed had been mislead with respect to such matters by Al Bryant himself.

With respect to (2) above, it is noted that Bryant himself testified that after Ortega had complained to Keystone he received a visit from Keystone representatives Martz and Getz. What transpired on that occasion was related by Bryant as follows:

> All right, they came to my office and said that they had a complaint from a Mr. Ortega that he was paid less than scale by Harrisburg Drywall.
>
> I explained to them that I had nothing to do with Harrisburg Drywall, they said well, you own it, and I said yes, I do own it but I don't run it, I have nothing to do with it.
>
> They ended up the discussion with me saying okay he [Ortega] has nothing to complain about if he was working for an open shop company, then he has no valid claim that he was paid less than union scale, because Harrisburg Drywall is not affiliated and went back and as they told me they were going to tell him that he was not entitled to any additional funds and that there was no complaint against Al Bryant, Incorporated but would I please do what I could as the owner of Harrisburg Drywall to see that it did not use union—members of the union on their work.

This representation by Bryant, if true, would tend strongly to exonerate Harrisburg Drywall from any bargaining obligation under the Act or any unfair labor practices in continuing to operate non-union. "The Board has pointed out that common ownership, by itself is not sufficient . . . [to establish single employer status]." See *United Constructors and Goodwin Construction Co.*, 233 NLRB 904. Furthermore, as shall be seen, Bryant had far more to do with the operations of Harrisburg Drywall than his own testimony indicates that he conveyed to union officials in connection with the Ortega matter. Furthermore, the evidence does not disclose that more accurate information regarding Bryant's involvement came into the hands of Keystone prior to the 10(b) cutoff date. Relevant to the question presented is the Board's statement in *Don Burgess Construction Corporation*, 227 NLRB 765, 766, to the effect that: "it has long been recognized that when a party has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . ." On balance, however, I am not convinced that such an extension is warranted here. Prior to the 10(b) cutoff date, Keystone was mindful that its members had been employed by Harrisburg Drywall, that Harrisburg Drywall had performed work covered by the CPSA contract, that Harrisburg Drywall had not adhered to the terms of that contract, and that Al Bryant owned Harrisburg Drywall. Those facts were in no way influenced by any representation made by Bryant and objectively viewed would strongly have suggested possible illegality in Harrisburg

Drywall's operations.[19] Anomally would result if Section 10(b) were interpreted as tolling the limitation on the basis of an exculpatory statement by the perpetrator of unfair labor practices. For example, in virtually all discriminatory discharge cases, the employer represents to the discriminatee that the discipline imposed was for a legitimate reason. The fact that this is later shown to be pretextual and false could not possibly serve to neutralize Section 10(b) without eliminating completely the 6-month limitation in most discharge cases. The representation attributed to Bryant is no more egregious, and I find that it did not rise to the level of fraud which would warrant rejection of the 10(b) defense.

Nonetheless, the inquiry does not end here, for the General Counsel contends in the alternative that the abnegation of obligations by an employer or labor organization under a collective bargaining agreement constitutes a continuing violation for purposes of Section 10(b). Under this approach, though statutory relief will not extend beyond the 10(b) cut-off date, the fact that initial repudiation of the agreement occurred prior thereto, does not absolve a Respondent from the unfair labor practices which inure from its continuing failure

[19] No precedent is called to my attention requiring the offended party to be aware of all factual elements substantiating an unfair labor practice before the 10(b) period begins to run. All that is required is that the "act" giving rise to unlawful conduct be known. To require more would reduce 10(b) to the meaningless. Seldom does an aggrieved party comprehend what is and what is not determinative of a cause. Furthermore, experience shows that dispositive elements of an unfair labor practice often first emerge at hearing. Absent clear precedent, in such circumstances, an otherwise meritorious assertion of 10(b) shall not be overridden because critical elements of unlawful conduct are unknown to the moving party.

within the 10(b) period, on demand, to execute or formerly abide by such agreement. See *e.g., Torrington Construction Company, Inc.*, 235 NLRB 1540, ftn. 2. In the instant case, by letter dated March 19, 1979, Keystone, through its attorney, informed Bryant that Harrisburg Drywall was covered by the applicable agreement, and that it was obligated to adhere to the terms thereof.[20] By virtue thereof, and Bryant's failure to satisfy the demand, I find that the alleged violation, to the extent predicated upon events on and after March 19, 1979, were within the 10(b) period and are actionable in this proceeding.

2. ABI's Obligation Under CPSA Agreements

The crucial predicate for the allegations in the instant complaints is that ABI was contractually bound to CPSA agreements with Western and Keystone. Respondents deny this to have been the case and if that view is valid no violations would inure even if ABI, Harrisburg Drywall and ABA, constituted a single, integrated employer within the meaning of the Act.

As indicated Keystone and Western both enjoy a bargaining history on a multi-employer basis with employers who negotiate through CPSA as their agent for such purposes. With respect to Keystone, CPSA executes separate agreements for "carpenters" and other members of the carpenters union who are engaged in the apparently less skilled "floor layer" classification. As to Keystone, Al Bryant conceded that he authorized CPSA to bargain on behalf of ABI with respect to soft floor

[20] See General Counsel Exhibit 9.

layers, but not the "carpenters" on whose behalf this proceeding is being maintained. Bryant went on to testify that although ABI is a "union contractor", functioning within the geographic jurisdiction of Keystone and Western, ABI had never become bound to either labor organization's contract with CPSA covering "carpenters".

Undisputed, believable evidence establishes that CPSA is an organization which includes as members subcontractors in the construction industry as well as others who are not engaged directly in construction work but who have interests in that industry. The responsibilities of CPSA include, but are not limited to negotiating collective bargaining agreements with various crafts represented by building trade unions. Although undocumented, I find that CPSA's negotiations with various labor organizations were binding only upon those of its employer-members who had afforded prior, written authorization of their intention to be bound. Although ABI, at least since 1972, had been a member of CPSA, Bryant claims that he at no time executed such an authorization with respect to the carpentry craft as represented by either Keystone or Western. For the reasons set forth below, I discredit Bryant's testimony in this regard.

Bryant admitted that ABI was a proper party to and bound by CPSA's negotiations with respect to soft floor layers. Though he acknowledged that ABI utilized both soft floor layers, and "carpenters", and indeed used the same individuals to perform both types of work, paying the rates under the appropriate CPSA contract as the work of these individuals shifted between the

jurisdictional coverage of the agreements, no explanation was offered as to why ABI would have authorized CPSA as to one but not the other.

More critical, however, is Bryant's admitted role in the affairs of CPSA as they related to Keystone. At that time of the hearing, Bryant was a director of CPSA and had occupied that position "a couple of years". He was president of CPSA when CPSA on April 18, 1977, executed a memorandum agreement with Keystone, renewing the terms of an existing contract to April 30, 1982. Al Bryant was not only spokesman for CPSA at the time, but alone negotiated the agreement binding upon certain CPSA employer-members. Thus, Bryant, in his testimony in this proceeding portrays himself as having used his position within CPSA to negotiate an agreement binding upon organized competitors, but not his own firm. Prior to the execution of that document, Bryant, by letter dated April 15, 1977, wrote Robert Getz, secretary-treasurer of Keystone, pertaining to those negotiations, requesting a minor change, which was justified in Bryant's own words, as follows:

> Bob, as I explained, we as subcontractors can not sign an agreement stipulating that we will perform "all the work" in view of the fact that we have no control over the distribution of all the work. We can, however, agree to perform and/or subcontract that work which we obtained, which is all the work we actually control.

> If this meets with your approval, please call me and we will arrange to sit down and execute the new agreement.[21]

Following execution of the agreement Orin Remsnyder, the executive director of CPSA, by letter date May 12, 1977, informed Keystone of the employer-members bound both to the "carpenter" and "floor layer" agreements.[22] Al Bryant, Inc. was listed in both categories. Bryant acknowledged having received a copy of this letter.

The Remsnyder letter is of course highly material to Respondents' denial of any contractual commitment with respect to the "carpenter" agreement. Suspicion was hardly allayed by Bryant's reaction when he was asked to identify this document at the hearing. At that time the following colloquy took place:

> Q. (By Mr. Franckiewicz) I'm showing you what's been marked General Counsel's Exhibit 7, would you tell us what that is please?
>
> This is a letter which Orin Remsnyder of C.P.S.A., sent to Mr. Getz, with a copy to you, is that correct?
>
> MR. BECKLEY: Objection to the form of the question, it presupposes a true statement.
>
> THE WITNESS: I have no record.

* * *

[21] See General Counsel Exhibit 6. In all, the first person plural was used 7 times by Bryant in this passage.

[22] See General Counsel Exhibit 7.

Q. (By Mr. Franckiewicz) This is a copy you received of a letter signed by Mr. Remsnyder is that correct?

MR. BECKLEY: Objection to the form of the question.

JUDGE HARMATZ: Why don't you ask him to identify it.

Q. (By Mr. Franckiewicz) What is this?

A. It appears to be a letter from Mr. Remsnyder to Mr. Getz, listing those people that are in signed agreement for the Carpenters and the Soft Floor Layers.

Q. Okay, and you will notice the carbon copy to Al Bryant at the bottom?

A. I notice it, but I have no record of having received it.

Q. All right, at the arbitration proceeding, did you testify about this letter?

A. I didn't, no.

Q. Let me see if I can refresh your memory. As a matter of—

JUDGE HARMATZ: Let him show you the transcript

THE WITNESS: Yeah, okay.

Q. (By Mr. Franckiewicz) Now, on General Counsel's exhibit 7, you will notice that I have scratched out Union exhibit 3, this was Union exhibit 3 at the arbitration?

A. Right.

Q. And you were asked—

MR. BECKLEY: Would you tell us please, what your are referring to?

MR. FRANCKIEWICZ: Page 58.

Q. (By Mr. Franckiewicz) You were asked if you got a copy of that letter marked Union exhibit 3, that shows a cc at the bottom?

A. Yes.

Q. And you testified yes?

A. Right.

MR. BECKLEY: He's doing it again, sir, let the witness read on with the testimony.

MR. FRANCKIEWICZ: I'm willing to go on with the rest of the page, I will read it from the record.

MR. BECKLEY: Yes, please do that this time.

MR. FRANCKIEWICZ: All right, and the witness was then asked, "You did receive a copy of that?"

"A. I assume so."

Continuing, "Do you notice Al Bryant's name listed?" "Yes, I do."

"Q. On both Soft Floor and for Carpenters?"

"A. Yes."

"Q. Did you ever object to that?"

"A. Yes."

"Q. When?"

"A. To Mr. Remsnyder, when I received the letter."

Any further that you want me to go? I think I've covered it all.

MR. BECKLEY: I think we could have it xeroxed, and the rest of it put in.

MR. FRANCKIEWICZ: Well, it's already in, I offer General Counsel's exhibit 7.

JUDGE HARMATZ: You couldn't have been mistaken that you had objected to the name of your firm appearing on that letter?

THE WITNESS: No, that I couldn't have been mistaken.

JUDGE HARMATZ: Okay, and it was the fact that your firm was listed in that letter, that made you object?

THE WITNESS: That's correct, sir.

JUDGE HARMATZ: So you must have received a copy of that letter?

THE WITNESS: Well, that's why, as the conversation started, I started to say something that I remembered a discussion about it, but then I didn't know whether I was going to be talking about the wrong thing, very frankly.

JUDGE HARMATZ: Now, with the refreshing of your recollection,—

THE WITNESS: Yes, sir.

JUDGE HARMATZ: You are positive that you received a copy?

THE WITNESS: I'm positive I received it.

JUDGE HARMATZ: What is marked as General Counsel's 7?

THE WITNESS: Yes, sir.

JUDGE HARMATZ:. Okay, so be it.

* * *

As indicated in the above extract from the transcript, Bryant claimed that when he received a copy of Remsnyder's letter, he immediately protested, not to Keystone, but to Remsnyder. Bryant further testified that Remsnyder was instructed to notify the Union that CPSA lacked authority to bargain for ABI and that Remsnyder assured Bryant that he would do so.

In assessing the credulity of this explanation it is of interest that Bryant himself had been involved in the process of responding to Keystone's requests for the very information that was contained in the Remsnyder letter. Thus, by letter dated April 18, 1977, Bryant wrote Keystone as follows:

> Attached is a signed copy of the new Agreement between CPSA and the Keystone District Council of Carpenters. As you know, CPSA is signing on behalf of those employers who have given us bargaining

rights. Since I do not have a copy of the bargaining rights in my office, I will send you a list of the contractors and a photocopy of the bargaining rights as soon as Orin Remsnyder returns from the convention in California (next week).

cc: CPSA Office

Bryant obviously chose not to inform Keystone of the status of ABI at that time.

Remsnyder, in an attempt to corroborate Bryant, testified that at the time he prepared his subsequent May 12, letter, he was very new on the job, and did not understand the nature of Keystone's "repeated" requests for a listing of CPSA members bound to the new agreement. He claims not to have really known how to respond to Keystone. Remsnyder claimed to have obtained this information, not from Bryant, the president of CPSA, who himself had testified that he alone negotiated the contract,[23] but from Marlin Slough, a director and member of CPSA.[24]

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[23] As indicated, a copy of Bryant's April 18 letter to Keystone concerning such a listing was sent to "CPSA office". See General Counsel Exh. 8.

[24] Remsnyder testified that the 1977 negotiations were conducted on behalf of CPSA by Chief Negotiator Marlin Slough. His testimony in this regard conflicts with Bryant's own acknowledgement that he alone negotiated the 1977 agreement with Keystone. Slough did not testify. I did not believe Remsnyder, and regard it as somewhat extraordinary that he would consult in preparing the list with anyone other than Bryant himself, who as president of CPSA alone had negotiated the agreement and who had written the Union that submission of this very list would be deferred until Remsnyder's return.

Remsnyder further testified, that having forwarded a copy of the May 16 letter to Bryant, he received a telephone call from the latter. Bryant assertedly informed "that he had not given CPSA his bargaining authorization at that time . . ."[25], whereupon, Remsnyder claimed to have searched CPSA's files and found no bargaining authorization from Bryant. Beyond that, Remsnyder initially testified that he "thought" that Bryant asked him to inform the Union of this fact, and that he "thought" that he did contract Getz as directed.[26]

A further fact casting doubt upon the veracity of Remsnyder in this respect emerges from Respondents claim that CPSA had not been authorized by ABI to bargain with respect to "carpenters" with any labor organization, including Western. Unexplained, is the fact that Remsnyder, who would have me believe that he made a critical error in 1977 by including ABI in the list of employers bound to the Keystone negotiations, apparently repeated that mistake in 1978, when a similar list was delivered by Remsnyder to Western in connection with CPSA's negotiation with that labor organization. Again ABI was listed as among the contractors having authorized CPSA to bind them with respect to a contract convering carpenters.[27] Unlike what

[25] Remsnyder testified that, though he had been employed by CPSA since July 1976, he had not known previously information that bargaining authorizations were required before any employer-member could be bound to the results of CPSA's negotiations with various labor organizations.

[26] Getz denied ever having received such information from any source. I credit Getz over Remsnyder in this regard. Remsnyder did not impress as having independent recollection of such matters, and in any event he was regarded as an unreliable witness.

[27] See General Counsel Exhibit 26.

transpired a year earlier, Remsnyder affords no explanation as to why ABI was included on the 1978 listing, or whether or not he cleared this matter with Al Bryant before doing so.

With respect to Western, the denial by Bryant that ABI had duly authorized CPSA to bind itself is totally lacking in corroboration. According to the uncontradicted testimony of Robert Argentine, Western's executive manager, CPSA first negotiated on behalf of its employer-members with Western in 1972. Subsequent negotiations in 1975 and 1978 produced renewal agreements with the most recent expiring in 1981. Nancy Linn Shaffer was the chief spokesman for CPSA in 1975.[28] At the request of Western in 1975, Shaffer provided a list of the contractors represented by CPSA at the time. ABI was listed among the "... employers who have granted bargaining authorizations to CPSA for the 20 county District Council Carpenters of Western Pennsylvania Agreement."[28] During the 1978 negotiations Orin Remsnyder was the chief spokesman on behalf of CPSA. In the course of negotiations a list of the contracting firms represented by CPSA was requested by Western and provided by CPSA. ABI was included on the list.[29] No claim was registered herein that ABI was included on the 1975 and 1978 listings erroneously.[30] Nor is there

[28] See General Counsel Exhibit 25.

[29] See General Counsel Exhibit 26.

[30] In the circumstances, I find the entries on General Counsel's Exhibits 25 and 26 to be binding upon the Respondents. Uncontradicted evidence establishes that CPSA delivered the listings in question to Argentine in the course of CPSA's negotiations with Western in 1975 and 1978. With respect to the 1978 negotiations,

(Footnote continued on following page)

evidence that ABI had ever notified CPSA or Western that it had not designated CPSA to bargain in its behalf with that labor organization.[31]

While I reject as unbelievable the testimony of Bryant and Remsnyder to the effect that CPSA held no written authorization to bind ABI to negotiated bargaining agreements with Keystone and Western pertaining to conditions of work of "carpenters", the assertion that ABI was bound to such agreements is maintainable on other grounds as well. Thus, under settled Board authority, an employer may be deemed bound by results of multi-employer negotiations, even though express authorization of bargaining authority be withheld, and the employer had not signed the contract, if the employer's conduct manifested an intention to be bound.[32] The instant cause presents a strong context for

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(Footnote continued from preceding page)

Remsnyder's own testimony confirms that, as of that time, he would have been aware of the significance of listing an employer that had failed to authorize CPSA to bargain on its behalf. Furthermore, Remsnyder was available to testify to any circumstances beclouding the authenticity of General Counsel's Exhibit 26. A circumstantial chain exists which is corroborative, through inference, of the accuracy thereof. Furthermore, as CPSA negotiates agreements binding upon employers executing proper written authorizations as a regular part of its operations, one might rightfully assume that General Counsel's Exhibit 26 found its origin in business records regularly maintained by CPSA in support of that function. See *Federal Rules of Evidence*, Rule 803-6.

[31] It will be recalled that Remsnyder testified that he notified Keystone that ABI had not authorized CPSA to bargain on its behalf. Though this testimony was not believed, it is noted that Remsnyder did not testify that any such communication was ever forwarded to any representative of Western.

[32] See e.g., *Fitzpatrick Electric, Inc.*, 242 NLRB 739.

application of that principle. Al Bryant, the president of ABI, who together with his wife owned all stock of the firm, considered ABI to be a "union contractor". While asserting that his status was voluntary and not based on contractual commitment, he concedes that ABI's operations were marked in their entirety by adherence to the terms of contracts negotiated by CPSA including the payment of required fringe benefits and observance of union security and dues checkoff provisions.

In addition to his adherence to the terms of those agreements, Bryant beginning in 1976, attended, and even hosted joint labor management meetings through which members of CPSA sought relief from their adverse competitive position with non-union subcontractors. Furthermore, pursuant to separate contracts negotiated by CPSA with seven craft unions in the building trades, including the Carpenters union, a trust fund was established, which was jointly administered by labor-management representatives. At least since March 1, 1977, Al Bryant has been a trustee of said fringe programs and hence presumably was in a position to influence the administration of benefits of craftsmen covered by the CPSA agreements including "carpenters". Finally, as indicated, Bryant's positions as director, president, and negotiator on behalf of CPSA would unmistakably convey that he was situated identically to ABI competitors that had duly effected bargaining authorizations to CPSA. As Bryant conceded that he had not informed Western or Keystone that ABI was not bound to the agreements negotiated with those labor organizations by CPSA, and other testimony as to the existence of such notification has been rejected, I

find additionally that ABI through the conduct of its principal owner and functionary Bryant manifestated an unequivocal intention to be bound to CPSA contracts with Western and Keystone to the point of raising an estopple against denial of that fact. "An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority." *Custom Color Contractors*, 226 NLRB 851, 853. That is precisely what occurred here.[33]

3. The Single Employer Issue; The Keystone Arbitration

No claim is registered in the instant proceeding that ABI, as a separate entity, failed to adhere to the terms of the CPSA agreements. The gravamen of the complaints is addressed to the operations of Harrisburg Drywall and ABA, which admittedly operated on a

[33] Based upon the foregoing, it is unnecessary to pass upon the legal consequences of ABI's execution the International Agreement in 1972. See General Counsel Exhibit 4. With respect to Respondents references to Section 8(f), it is noted that, while an employer would assume no enforceable obligation under such an agreement, that consequence does not obtain in the case of a successor agreement, or where, since execution, the Union had acquired majority status among the employees. No evidence exists warranting a finding that the CPSA agreements in question were 8(f) contracts, nor does it appear that, if they were, ABI's responsibility pursuant thereto was unenforceable. See *Williams Enterprises, Inc.*, 212 NLRB 885; *Authorized Air Conditioning Co.*, 236 NLRB 131, 134. Furthermore, the collective bargaining agreements negotiated between CPSA and Western and Keystone define the unit in a manner consistent with what generally is recognized as appropriate in scope in the building and construction industry. No facts have been presented rebutting the presumption that Western and Keystone continued to represent a majority of said employees at all times material herein.

nonunion basis, but which according to the consolidated complaints, constituted a single employer with ABI, and hence are bound to the contractual obligations of the latter.

Harrisburg Drywall evolved from a sole proprietorship operated under the name by one Geno Premici. In 1971, at Premici's request, Bryant invested in Harrisburg Drywall, after the firm was incorporated and Bryant was permitted to retain controlling ownership. In late 1972, Premici's stock was purchased by the Corporation, Premici parted company, and Bryant became sole owner of the outstanding corporate shares.

At all times since the incorporation of Harrisburg Drywall, it was headquartered at the Hummingbird Land facility also utilized by ABI. Said facility is owned by Al Bryant and his wife. Until December 31, 1979, those premises were leased to ABI. Since 1972, ABI has subleased space to Harrisburg Drywall. However, this was apparently accomplished orally for there is no written lease memorializing the terms thereof.

During the years of its operations it appears that the only assets of a corporeal nature retained by Harrisburg Drywall were a single, 1974 vintage van, and some office equipment inherited from Premici's firm. In other respects, Harrisburg Drywall utilized on and off site construction equipment, including trucks, hoists, forklifts and saws owned by ABI. Office equipment owned by ABI was also utilized in connection with operations of Harrisburg Drywall. Harrisburg Drywall had no warehouse, engineering, sales or clerical force, but individuals employed by ABI served the former's needs

in these areas. All utility costs, including gasoline, electricity, telephones, incurred by Harrisburg Drywall and ABI were paid by ABI.

No written agreements existed evidencing the "housing" arrangement as between ABI and Harrisburg Drywall or the former's provision of equipment, administrative support and expenditures for overhead costs. Compensation of ABI in these areas was pursuant to an accounting system devised by the accountant, selected by Al Bryant, on behalf of both companies to allocate costs as between the two firms. Thus, at the end of annual accounting periods, such cost were shared by ABI and Harrisburg Drywall in proportion to the gross volume of business done by each. This arrangement, was hardly indicative of "arms length" dealing. While the pooling of administrative and clerical resources may be accomplished in other areas by indisputably separate entities, I reject any notion that in such cases the costs of such services are deferred and not borne with a degree of immediacy. Here, ABI bore all expenses for a 12-month period, a burden tantamount to an interest-free, extension of credit to Harrisburg Drywall. Along the same line, Bryant testified that there was no established rental charge for ABI's equipment. As the latter entails a nonrecurrent, capital expenditure, this charge-off would not be suitable to allocation in the same manner as items whose cost accumulates continuously with use. Bryant explained that ABI was compensated as to equipment by allocation of depreciation as between the firms. As a general proposition, annual depreciation on capital assets would be something less than fair rental value.

The foregoing portrays Harrisburg Drywall as a operational shell with no independent administrative capacity and little in the way of capital assets. As shall be seen below, this was complemented by integration of ABI resources upon the operations of Harrisburg Drywall at every level, from management to craftsmen who performed on the job site.

From the standpoint of management, the nominal head of Harrisburg Drywall was Charles May. Bryant in 1975 selected May to "run" Harrisburg Drywall.[34] May was a craftsman, whose employment as a "carpenter" dated back to 1959. According to Bryant, he together with May jointly decided to operate Harrisburg Drywall as a nonunion company.[35]

May engaged substantially in providing field supervision at various job sites and worked from time to time with his own tools on jobs. From direct observation, and his testimony, May impressed the undersigned as more at home in that capacity than as a manager. For example, May could not identify the accountant of Harrisburg Drywall, did not know who purchased office supplies for that firm, did not know whether Bryant dealt with Harrisburg Drywall customers and had no

[34] The record does not disclose that Harrisburg Drywall was operational during the period between the 1972 departure of Premici and 1975. The possibility of dormancy of that firm was suggested by Bryant's threat in 1976 or 1977 at the "Compete Meetings" to utilize another firm to perform on a nonunion basis.

[35] I did not believe that May had any role in this decision. There, obviously, would have been no need to reactivate or utilize Harrisburg Drywall for any other purpose. It is plainly inferrable on this record that the "open shop" market was the sole reason for this firm's existence. There is no evidence that that firm ever operated in any other market.

comprehension of the overtime system applied to the latter's employers. May acknowledged that he had nothing to do with the financial end of Harrisburg Drywall and hence did not know whether ABI and Harrisburg Drywall loaned money to each other. Since May declared that he had no role in the financial end of Harrisburg Drywall, obviously this area was subject to exclusive control of ABI functionaries.[36]

Apart from my doubts as to whether May exercised authority on behalf of Harrisburg Drywall beyond that of a supervisor, with power to hire, fire, and supervise jobs, it is clear that he had no separate identity with Harrisburg Drywall. Thus, Charles May is shown as a direct payroll employee of ABI in 1977 for in excess of 1400 hours,[37] in 1978 for some 80 hours, and in 1979, for some 170 hours. It is fair to assume that during these periods, May had been engaged by ABI to perform field supervision on the latter's jobs. Uncontradicted evidence establishes that May while serving in that capacity engaged in hiring on behalf of ABI,[38] In addition, it was his responsibility to assure that those jobs were completed properly, and to instruct employees to that end. May also kept the time records of ABI employees on such jobs.

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[36] Marvin Rosenbaum, a CPA, whose accounting firm provides accounting services to the Respondents testified that a general entry on General Counsel's Exhibit 39(e) indicates that in 1978, ABI charged Harrisburg $30,000 for "management services". See General Counsel's Exhibit 36(e). Mr. Rosenbaum testified that the amount of this fee was determined by the client. No evidence exist on this record as to the basis for this charge as against Harrisburg Drywall.

[37] See General Counsel's Exhibit 36(gg-1) through (gg-4).

[38] See testimony of George Gulliver.

Because Harrisburg Drywall had little in the way of administrative resources, and perhaps, since May often worked in the field for both firms, its administrative and managerial functions were performed by ABI personnel. Larry McClain, who at no time was on the payroll of Harrisburg Drywall, but an employee of ABI, admittedly performed work for Harrisburg Drywall. His tasks in this regard included coordination of phases of the Harrisburg Drywall operations, the preparation of job estimates, submitting bids and purchasing in connection with that firm's jobs. In addition, carpenters employed by Harrisburg Drywall would communicate with McClain and receive instructions as to whether and where they were to work the next day.

Bryant was also involved to a considerable extent in the affairs of Harrisburg Drywall. While admitting that he controlled the fiscal affairs of Harrisburg Drywall, Bryant denied involvement with either office or field personnel. As to fiscal matters, Bryant selected Harrisburg Drywall's accountant, the bank it uses, and periodically reviewed, together with Jean Hoffman, also an employee of ABI, Harrisburg Drywall's accounts receivable to assure against discrepancies. He also admittedly on a frequent basis negotiated and signed contracts on behalf of Harrisburg Drywall, and executed lien waivers on behalf of that firm.[39] Bryant has signed the paychecks issued to Harrisburg Drywall employees.[40] In connection with the Polk Center job, a job performed by Harrisburg Drywall during 1979 and 1980, Al Bryant signed the bid[41] and was the contact man because, as he

[39] See General Counsel Exhibit 13.

[40] Normally it is the function Jean Hoffman, an ABI employee, to sign the paychecks of Harrisburg Drywall personnel. In her absence, Bryant performs this function.

[41] See General Counsel Exhibit 15.

explains it, the size of the job, and the fact that May was out working other jobs, rendered it necessary that Bryant serve in that capacity.

Bryant's denial that he had any involvement in hiring on behalf of Harrisburg Drywall was refuted by specific testimony, which otherwise was left to stand uncontradicted to the effect that Bryant, together with McClain, interviewed and hired a former ABI employee for Harrisburg Drywall,[42] and that on another occasion Bryant met with a number of ABI carpenters, advising them that union work was insufficient to keep them busy, while offering them work with Harrisburg Drywall.[43] Other testimony indicates that Bryant entertained grievances of Harrisburg Drywall's employees. Thus, George Gulliver, while employed by Harrisburg Drywall, requested a raise of Bryant, which he received under circumstances, permitting inference that Bryant had approved the increase. It also appears that a grievance concerning travel pay was addressed to Bryant by Gulliver while on Harrisburg Drywall's payroll. Bryant said he would check with McClain. Later Gulliver received travel pay.

McClain denied that he hired for Harrisburg Drywall, testifying that May had done so. However, in a brief filed on behalf of Al Bryant, Inc. in the arbitration proceeding, over signature of Thomas A. Beckley and James P. Collins, Esqs., the following appears:

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[42] See testimony of Ronald Myers.

[43] See testimony of Oscar Acri. Note also that David Seace testified that Bryant offered him work on a non-union job in Reading in 1977, which Seace declined.

"... Larry McClain ... did and does the hiring for Harrisburg Drywall ...".[44] Further, according to testimony afforded by Bryant, under oath in the arbitration proceeding, Larry McClain did the hiring for Harrisburg Drywall.[45] As heretofore indicated, McClain was also involved in a layoff of Harrisburg Drywall employees, and advised employees where and when to report for work.

While the foregoing amply attests to the intervention of ABI in the labor relations of Harrisburg Drywall, the integration of the two entities is further evidenced by the frequent and seemingly at random interchange of craftsmen as between Harrisburg Drywall and ABI. In several instances, carpenters would work for both firms during the same work week. This occurred in excess of 50 times in 1979, on 30 occasions in 1978, and in excess of 80 in 1977. On at least two occasions, the same employee worked for both firms in a single day. Carpenter Gulliver testified that the only way he could tell which firm he was working for was the designation on the payroll check.[46] The lack of separate identity of the respective work forces of Harrisburg Drywall and ABI is indicated by the fact that in 1977, 10 of the 14

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[44] See General Counsel's Exhibit 21(b), p. 4.

[45] See Respondent Exhibit 1(a), p. 28. See also the testimony of Donald Myers. The above discrepancy was among a number of factors which hardly inspired confidence on Respondents' witnesses.

[46] Leroy Curtier testified that in connection with the Gem Building job, he was employed by ABI, but later, without notice, transferred to the payroll of Harrisburg Drywall, a fact he discovered only after his paycheck, reflected that he was working for the latter at a lower rate of pay. Another carpenter Richard Grundon testified to a similar experience on the same job site.

employees on the payroll of Harrisburg Drywall had also worked for ABI, in 1978, 8 Harrisburg Drywall employees had worked for ABI, while in 1979, 6 Harrisburg Drywall employees had also appeared on the payroll of ABI.

Harrisburg Drywall as a nonunion subcontractor does not normally bid on the same jobs as ABI. However, on at least two projects, Harrisburg Drywall was replaced by ABI.[47] According to Bryant, on at least one of these jobs, Harrisburg Drywall "subcontracted" to ABI because it took the job on misinformation that it was an open shop, when in fact it was a union job. When union contractors protested the presence of Harrisburg Drywall, the job was completed by ABI.

Under established Board policy, the test of whether two separate entities are to be regarded for purpose of the Act, as a single employer turns upon the relationship of the two firms in terms of common ownership, common management, interrelation of operations, and common control of labor relations.[48] I am convinced that upon analysis of the credible facts of record herein in the light of those standards, that Harrisburg Drywall and ABI may not be regarded as separate employing entities.

Both firms were subject to common ownership, with Bryant owning all outstanding stock in one, 90 percent of the other, with the remaining 10 percent held by his

[47] On the Acciavatti job site, Thomas Fick was simply transferred from the Harrisburg Drywall payroll to that of ABI, when the latter replaced the former on that job.

[48] *Radio and Television Broadcast Technicians, Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965).

wife. Both firms performed the same services, in the same market, with the only distinction being that Harrisburg Drywall operated on an open shop basis, while ABI functioned under auspices of collective bargaining agreements with the Charging Parties. However, Harrisburg Drywall's existence operationally was almost entirely dependent upon facilities, equipment, administrative, engineering, sales and clerical support available through ABI. The absence of written leases or agreements, and the expense allocation system, as heretofore indicated warrants the conclusion that the two firms did not deal with each other on an "arms length" basis. Considering the nature of its assets, and its dependency upon ABI for basic support in virtually every aspect of its affairs, the instant record portrays Harrisburg Drywall as possessed of no greater autonomy than is necessarily entrusted to crews completing particular jobs. While Albert Bryant was a dominant factor with respect to all aspects of ABI, he controlled the fiscal affairs of Harrisburg Drywall. His imprint was also felt upon Harrisburg Drywall's labor relations, through involvement in the hiring process and condonation if not, authorization, of the utilization of ABI personnel to handle Harrisburg Drywall's payroll, to interview and hire employees of that firm, and to assign work to the latter. Furthermore, temporary interchange of *rank-and-file* and supervisory personnel within the two firms was so substantial as to suggest that it was a function of management convenience, more in the nature of assignment and transfer within a common labor pool, than termination and rehire by separate employing entities. I am convinced that it was

Albert Bryant, who in 1976, during the course of the compete meetings, threatened to utilize Harrisburg Drywall to compete against union contractors to have been the driving force behind activation of that firm for that purpose. Considering my impression of Charles May as a craftsman and foreman, more at home on a job site than in an office, together with his limited comprehension of major aspects of Harrisburg Drywall's operations, I am convinced on the basis of inference and plain record fact that labor relations policy of the latter was dominated by ABI personnel, including Albert Bryant. Based upon the foregoing, I find that Respondent-ABI and Respondent-Harrisburg Drywall constitute a single employer and that Harrisburg Drywall was the *alter ego* of ABI.[49]

It is also concluded on the instant record that the employees of Harrisburg Drywall constitute a natural acretion or share a sufficient community of interest with employees of ABI to render the former's employees a part of the appropriate unit in which ABI's employees had been historically represented. As has already been made clear, both firms hold themselves out to provide subcontracting services of an identical nature in a segment of the construction industry. Considering the functional integration of the operations, the similarity of

[49] See *e.g., Edward J. White, Inc.*, 237 NLRB 1020, 1025. That case, in my opinion, furnishes a closer analogue to the facts at hand than the fact pattern on which the Board reached a contrary result in the earlier case of *United Constructors and Goodwin Construction Company*, 233 NLRB 904. In any event, the more recent Decision in *Edward J. White, Inc.*, in the event of conflict, would control as the more recent pronouncement on the issue. See also *Local No. 627, International Union of Operating Engineers (Peter Kiewit & Sons', Co.)*, 518 F.2d 1040 (C.A.D.C., 1975) affirmed in material part, 425 U.S. 800 (1976).

the work performed and common skills of the employees, the extent of centralized management and supervision, the high incidence of temporary interchange, as well as centralized control of labor relations including the hiring and assignment of employees between jobs and firms, I find that a unit consisting of the "carpenters" employed by ABI and Harrisburg Drywall at all times material constituted a single appropriate grouping and part of the overall multi-employer unit within the meaning of Section 9(b) of the Act.[50]

Having found that ABI was at all times material bound through CPSA, to the latter's agreement with Western, I find that by refusing, upon request, to extend that agreement, on request, to employees engaged on projects discharged by Harrisburg Drywall within Western's geographic jurisdiction, Respondents' Harrisburg Drywall and ABI violated Section 8(d) and Sections 8(a)(5) and (1) of the Act.[51]

I have also found that ABI was similarly committed with respect to collective bargaining agreements between CPSA and Keystone. Though the single employer finding extends with equal force to the operations of Harrisburg Drywall waged within the geographic jurisdiction of Keystone, Respondents urge the 1979 arbitration award

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[50] *Cf. Peter Kiewit & Sons', Co.*, 231 NLRB 76.

[51] Credible evidence establishes that on various dates between January and May 1979, representatives of Western urged Bryant to perform Harrisburg Drywall's contract on the Polk Center job in accordance with Western's agreement with CPSA. The refusal to bargain became apparent when Harrisburg Drywall commenced work on that project on an open shop basis in June 1979.

as a bar to any relief as to the unit represented by Keystone.[52]

In this respect, it is argued on behalf of Respondents that the rights asserted in this proceeding by and on behalf of Keystone were submitted by the latter to binding arbitration and the award rendered by the arbitrator denying Keystone's grievance should be deemed conclusive under Board authority. In this connection, a close question is presented in connection with the doctrine enunciated by the Board in *Spielberg Manufacturing Company*, 112 NLRB 1080 and its progeny. By virtue of *Spielberg*, the Board indicated that it would yield to the arbitrual process and afford binding weight to the results thereof, *if* said proceeding appeared to have been fair and regular, if all parties had agreed to be bound thereby, and if the decision of the arbitrator was not "clearly" repugnant to the purposes and policies of the Act. In subsequently elaborating on these standards, the Board articulated a further requirement to the effect that it would not give binding force to an award unless the arbitrator had considered and decided the unfair labor practice issue.[53] While a number of factors are viewed as relevant to the inquiry herein, first to be considered is whether the arbitrator considered and decided the unfair labor practice issue and, second, if he

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[52] Contrary to Respondents, participation in the 1979 arbitration does not suffice to establish that it *fully* met its statutory obligations to bargain in good faith. That factor is irrelevant to the violations with which Respondents are charged specifically in this proceeding.

[53] See e.g., *Raytheon Co.*, 140 NLRB 883 (1963).

did so, whether the result he reached was repugnant to statutory policies.[54]

With the foregoing in mind, it is noted that the underlying grievance was originally defined by Keystone's attorney in a letter dated March 19, 1979, and his opening statement at the arbitration hearing as exclusively founded upon contract.[55] However, in its brief to the arbitrator, Keystone went beyond its contractual contention that Harrisburg Drywall, as a subsidiary of ABI, was bound to the CPSA agreement, but argued that even if the arbitrator were to reject this view, he was impelled to follow precedent of the National Labor Relations Board, and conclude on the basis of the

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[54] Keystone contends that the *Spielberg* criteria were not met because ABI took positions before the arbitrator signifying that it had no intention to be bound by the results of arbitration. While it is true that ABI adopted a stance that it was not contractually bound to CPSA bargaining agreements, issue was joined on this matter, and there is nothing to signify that ABI had not submitted to the arbitrator's jurisdiction to render a file and binding determination in that respect. Contrary to Keystone, this defense to the grievance was not the equivalent of a repudiation of the arbitrator's authority to issue a final and binding award.

[55] See General Counsel Exhibit 9. Among the contractual provisions cited, was the following as contained in the memorandum agreement negotiated and signed by Albert Bryant on behalf of CPSA, for a term of May 1, 1977 to April 30, 1982:

> 6. The employers, during the life of this agreement, will not establish or operate any subsidiary building construction company unless such company performs and/or subcontracts all work within the craft and geographic jurisdiction of the Union pursuant to the terms of this contract. The obligations of paragraph 5 shall apply to such a subsidiary company. This paragraph 6 shall be null and void in the event the Union fails in the obligations under paragraph 1, 2, and 3.

evidence before him that ABI and Harrisburg Drywall were a single employer and hence that as a matter of Federal law the contract was binding upon Harrisburg Drywall. This alternative view was amplified by a thorough recitation of authorities, and concluded with the admonition that "... the arbitrator should rule on the statutory issue as well as the contractual one."[56]

Whether the arbitrator carried forth on Keystone's demand is not entirely clear. In denying the grievance in his award of October 29, 1979, the arbitrator stated as follows:

> ... [t]he Arbitrator is not persuaded by the evidence that the Company has violated the 1974-1977 Agreement or 1977-1982 Supplemental Agreement. The Union presented no evidence of a joint venture between Al Bryant, Inc. and Harrisburg Drywall and Construction Corporation. Therefore, the basic question before the Arbitrator is whether Harrisburg Drywall is a "subsidiary" or "subsidiary building construction company" of Al Bryant, Inc. under Article V, Section 6 of the Agreement or Paragraph C.6 of the Supplement. In the Arbitrator's view, his role is limited to interpreting these terms of the Agreement, and it does not extend to enforcing the provisions of the labor Management Relations Act. To be sure, it may be appropriate to look to the federal law as an aid to this interpretation. In this context, the Arbitrator has carefully considered the National Labor Relations Board and Court cases which the Union

[56] See General Counsel Exhibit 21(a), pp. 8-24.

has cited where two or more Companies or corporations have have treated as a "single employer" for the purposes of determining whether the National Labor Relations Board will assert jurisdiction over them.

Here, the parties have not defined what should be considered to be a "subsidiary." Webster's New World Dictionary (College Edition) defines a "subsidiary" in part as:

> a company controlled by another company which owns most of its shares . . .

Black's Law Dictionary, Fourth Edition (revised) 1968 states:

> Subsidiary Corporation. One in which another corporation owns at least a majority of the shares and thus has control . . .

In this situation, there is no evidence that Al Bryant Inc. owns any shares of Harrisburg Drywall. Therefore, it would not ordinarily be considered a subsidiary of Al Bryant, Inc. in the usual sense of that term. It is true that Mr. Al Bryant owns most of the shares of both companies, but technically his ownership as an individual would not be sufficient for Harrisburg Drywall to be considered a subsidiary of Al Bryant, Inc. Moreover, there is absolutely no evidence that Mr. Bryant acquired Harrisburg Drywall, or operates it, as a subterfuge to divert business which would otherwise be available to Al Bryant, Inc. to a non-union operation. To the contrary, the record shows that

Harrisburg Drywall was an existing company; that Bryant was asked to assist it financially; and that he did so by forming it into a corporation in which he had 51% control. Although there is a suggestion in the record that the Companies share some equipment and office staff, it appears that they operate independently from one another; that there is no commingling of funds or common supervision of "field" employees. For the reasons given, therefore, the Arbitrator is unable to conclude that the Company has violated the Agreement as the Union contends. In view of this conclusion, the Arbitrator finds it unnecessary to rule on the other contentions of the parties.

DECISION

For the reasons stated above, the grievance is denied.

October 29, 1979

[s]
James M. Harkless
Arbitrator

Consistent with the contention of the General Counsel, the above is susceptible to interpretation that the arbitrator declined to pass upon the statutory issue, ruling only that he was "... unable to conclude that the Company has violated the agreement as the Union contends." The question of whether Harrisburg Drywall was a "subsidiary" within the intendment of the contract

differs from the statutory single employer issue and disposition of the former would not necessarily require full treatment and consideration of the latter. The Board's most recent pronouncement concerning the assignment of proof responsibility in this area was set forth in *Suburban Motor Freight*, 247 NLRB No. 2, pp. 3-49,[57] wherein it stated as follows:

> The Board can no longer adhere to a doctrine which forces employees in an arbitration proceeding to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule *Electronic Reproduction* and return to the standard for deferral which existed prior to that decision. In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. In like accord with the corollary rule stated in *Yourga Trucking*, we shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.

[57] See also *The Motor Convoy, Inc.*, 252 NLRB No. 175, JD p. 14.

In *Atlantic Steel Co.*, 254 NLRB No. 107 (1949), pp. 5-6, the Board articulated that latitude would be extended to those urging arbitral bars, stating as follows:

> In *Ratheon Company,*[58] the Board added the requirement to *Spielberg* that, in order for the Board to defer, the arbitrator must have considered the unfair labor practice in his decision. Since that time, there has been little discussion by the Board as to what this requirement means. Must the arbitrator actually discuss the unfair labor practice, or is it sufficient that he or she considered all of the evidence relevant to the unfair labor practice in determining whether the discharge was lawful under the contract? A review of the decisions shows that, while it may be preferrable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is normally required that the arbitrator have considered all the evidence relevant to the unfair labor practice in reaching his or her decision.

In this instance, the arbitrator's statement that his authority "does not extend to enforcing the provisions of the Labor Management Relations Act . . .", beclouds his entire award. In addition, serious question exists as to whether the statutory issue arose in the context of an evidentiary presentation enabling full and fair consideration of the statutory issue in the arbitral forum. The single employer issue generally entails assessment of a number of factors, many of which are beyond common knowledge but reposed peculiarly within that of the

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[58] 140 NLRB 883 (1963) enf. den. 326 F.2d 471 (1st Cir., 1964).

employer. Illustrative thereof is the following statement made by Mr. Beckley, counsel for Respondents, before Arbitrator Harkless:

> The only evidence he [Keystone's attorney] can put in as to the Harrisburg Drywall and Al Bryant, Inc. would be coming from a witness employed by and knowledgeable of those corporations.[59]

Consistent therewith, before the arbitrator, Keystone had subpoenaed a number of documents relative to operations of ABI and Harrisburg Drywall. Respondents moved to quash that subpoena[60] and pursuant thereto strong suggestion appears that important information regarding Harrisburg Drywall, including a listing of its employees was never produced for consideration by the arbitrator. Whether or not legitimatedly maintained, the withholding of evidence highly material to the unfair labor practice issue casts considerable doubt upon whether any resolution of that issue was made on a fairly constituted record.

Question also exists as to whether the award, if incorporating a disposition of the statutory issue, was sufficiently consonant with statutory policy to warrant deferral. The General Counsel in contending that the arbitrator's award was repugnant to the Act[61] relies

[59] Respondent Exhibit 1(b), p. 91.

[60] See Respondents Exhibit 1(a), pp. 8-11, 49; Respondents Exhibit 1(b), pp. 78-88, 105, 143, and 146.

[61] Keystone urges that the award be disregarded since a representation issue is involved of the type solely within the province of the Board. There is no merit in this view. The single employer issue is the premise for an 8(d) violation which would if substantiated call into play Board remedies to enforce said contract as against Harrisburg Drywall. The merits of that issue and the remedy only tangentially bears upon and fails to relate directly to a question concerning representation.

chiefly upon the view that upon proper assessment of the various factors recognized by the Board as relevant to the single employer determination, "... it becomes apparent that the companies do comprise a single employer and part of the same bargaining unit."[62] Thus, it is argued that because, the arbitrator reached the wrong result his award should be dishonored. Under precedent, the question of what is meant by repugnant to the policies of the Act involves a qualitative case by case assessment of just how much error will be permitted before an award is rejected. Recent Board majorities have suggested that, absent "indisputable factual error",[63] the Board will not dishonor awards because factually discrepant.[64] Furthermore, legal conclusions embodies in such awards have been endorsed where they evidenced "reasonable" determinations of statutory issues even though the Board, on considering the merits,

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[62] The General Counsel cites *Local Freight Drivers, Local No. 208 (Barrago Freight Lines, Inc.)*, 219 NLRB 821. In that case, the Administrative Law Judge had refused to honor an award of a joint Board, finding that two employers were one and the same, both on grounds that one employer had not received notice of the proceedings, and further on the basis of her findings that the employers were separate entities. However, the value of that ruling is diminished by the fact that a Board majority ultimately dismissed the case on the merits, and having done so, reduced the *Spielberg* issue to the academic.

[63] See *Pincus Brothers, Inc.*, 237 NLRB 1063 (Members Jenkins, Murphy and Truesdale).

[64] See e.g., *American Bakeries, Co., Inc.*, 249 NLRB No. 170 (Members Penello and Truesdale, with Members Jenkins dissenting) and *Kansas City Star Co.*, 236 NLRB 866 (Members Penello and Murphy, with Member Truesdale concurring; Chairman Fanning and Member Jenkins dissenting).

might have applied the law differently,[65] or where the arbitrator's reasoning did "no substantial violence" to Board policy.[66]

The "single employer" issue in this proceeding raises the spectre of an employer's evasion of collective bargaining obligations through the utilization of deceptive corporate forms. Thus critical policy interests are involved affecting the balance of competitive interests in the market served by the Respondents together with those of employees denied contractual benefits. Close scrutiny of arbitral decisions in such a context seems necessary to vindicate statutory policy. For example, an employee's outright repudiation of key sections of a collective bargaining agreement has led the Board to decline to defer to arbitration, on the following reasoning:

> . . . [t]he jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principle functions—the establishment and maintenance of a viable agreement on wages.[67]

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[65] See *Arnold Junior Fenton*, 240 NLRB No. 26 (Chairman Fanning, Members Jenkins and Penello); *Associated Press*, 199 NLRB 1110, 1114 (Chairman Miller, Members Kennedy and Penello).

[66] See *Pacific Southwest Airlines*, 242 NLRB No. 15, pp. 5-6 (Members Penello and Truesdale, with Chairman Fanning dissenting.

[67] *Oak-Cliff-Golman Baking Company*, 207 NLRB 1063, 1064. Although the Board was there involved with a question of prearbitration deferral pursuant to *Collver Insulated Wire*, 192 NLRB 837, the above matter is of relevance insofar as it reflects upon the statutory significance of the issue involved here.

In sum, I find that the award of Arbitrator Harkless is entitled to no weight in the instant proceeding. In so finding, I rely upon no single standard under *Spielberg*, but rather a combination including (1) strong indication that the arbitrator expressly declined to resolve the statutory issue, (2) serious question as to whether positions taken by Respondents at the arbitration hearing barred full and fair evidentiary consideration of that issue, and (3) the fact that the arbitrator, if he had resolved the statutory issue, did so in a critical area of statutory policy, while reaching a result at odds with a proper application of the law on a fully developed record. For the above reasons, it is found that ABI and Harrisburg Drywall constitute a "single employer" within the meaning of the Act, that both were bound to CPSA's agreements with Western and Keystone and that Respondents violated Section 8(d) and 8(a)(1) and (5) of the Act by Harrisburg Drywall's failure to adhere to the terms thereof.

Remaining for consideration are the like allegations in Case Nos. 6-CA-13716 and 6-CA-13914, with respect to ABA, a third corporation established after initial unfair labor practices charges were filed herein naming ABI and Harrisburg Drywall. ABA commenced operations as a new corporation on January 1, 1980. Prior thereto, the original charge in Case No. 6-CA-10417 (formerly 4-CA-10417), was filed on August 10, 1979 by Keystone and charges had been filed by Western in Case 6-CA-12800, on October 3, 1979.

Bryant testified that the new corporation came into existence in November 1979. The directors of ABA were Al Bryant, Larry McClain, and Jean Hoffman. Larry

McClain became its president, Al Bryant, vice-president in charge of sales, and Jean Hoffman, vice-president in charge of administration. These positions have been held since January 1, 1980. Bryant also is the treasurer and Jean Hoffman, the secretary.

Stock ownership in ABA was held as follows:

McClain	35 percent
Hoffman	35 percent
Al Bryant	30 percent.

ABA functioned as a subcontractor or contractor affording the same services as provided by Harrisburg Drywall and ABI. Like Harrisburg Drywall, it operated on an open shop basis.

Al Bryant testified as to the genesis of ABA. He related that in the fall of 1979 for both personal reasons and because of the unfair labor practice charges and lawsuits filed against him by Keystone, he decided to reduce his involvement in the industry by phasing out Harrisburg Drywall, and reducing ABI's work. He claimed that McClain and Hoffman, as long term, key employees, were informed of his intentions in approximately September 1979. At that time, Bryant informed Hoffman and McClain that he was giving them advance notice, so that they would have full opportunity to obtain new employment.[68] Shortly thereafter, according to Bryant, McClain and Hoffman asked if they could purchase Harrisburg Drywall. Bryant claimed to

[68] Charlie May, the president of Harrisburg Drywall, was not included in these conversations, because, according to Bryant, he was confronted with serious personal problems at the time.

have discouraged this, indicating that he "... didn't think that was a very good idea because Harrisburg Drywall was in the middle of a series of labor problems at that point." Later, McClain and Hoffman, as Bryant related, returned, requesting his assistance in enabling them to start their own business as long as Bryant was getting out. This led to a series of meetings, out of which evolved the creation of ABA.[69]

ABA was capitalized on the basis of cash contributions from McClain and Hoffman of $20,000 each.[70] Bryant contributed all the outstanding stock of Harrisburg Drywall, the net worth of which at the time was $40,000. Thus, Bryant invested an amount equal to one half of the capitalization of ABA, but received only 30 percent of that firm's stock.

With respect to compensation, Al Bryant, pursuant to a 10-year "consulting agreement" with ABA, is to be

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[69] McClain testified that in September or October 1979, Al Bryant informed himself and Hoffman that he was going to reduce the work at ABI, slowing down to a level where Bryant and a secretary could handle all the work. Bryant went on to explain that he would no longer needed the services of McClain and Hoffman and that they should make suitable arrangements to obtain other employment. Hoffman did not testify.

[70] The record indicates that the $20,000 cash payment was not made by Hoffman until March 26, 1980. See Respondent Exhibit 10. In addition, because of the delay in this payment, Hoffman paid ABA on the same date the sum of $460.32 in interest. McClain made his contribution on the basis of five separate payments. Two were made on December 4, 1979 for a total of $1,000. The balance was paid off on January 2, 1980 ($4,000), January 7, 1980 ($5,000), and February 25, 1980 ($10,000). It does not appear that McClain made any interest payments to ABA with respect to the deferred portion of his contribution.

paid by ABA at least for the first two years, the sum of $40,000 annually. McClain, the president of ABA, could not recall with certainty the amount of his salary. He estimated that it was in the neighborhood of $20,000. When questioned as to Hoffman's salary with ABA, here again, McClain was unsure, but estimated that it was between $15,000 and $16,000.

With the establishment of ABA, it appears that various administrative and warehouse employees formerly on the payroll of ABI, became employees of ABA. Thus, the ABI payroll record for the week ending 12/26/79 lists the following:

Larry V. McClain
Albert I. Bryant
R. Victor Hendrickson
Jean E.F. Hoffman
Wayne T. Lutz, Jr.
Andrea R. Mumma
Ronald L. Hinkelman
Frank Krautheim
Catherione Sebacius[71]

It is noted that Hendrickson and Lutz were salesmen. Mumma and Sebacius were clericals. Hinkelman was an engineer and draftsman. Krautheim was a warehouseman.

[71] See General Counsel Exhibit 32-zz.

At the same time the payroll journel for ABA for the period ending January 9, 1980 listed the following:

Albert Bryant
R. Victor Hendrickson
Jean E.F. Hoffman
Frank A. Krautheim
Wayne T. Lutz, Jr.
Larry V. McClain
Andrea R. Mumma
Catherine R. Sebacius[72]

Thus, unlike the relationship between Harrisburg Drywall and ABI, upon the inception of ABA, ABI no longer retained independent capability in the sales, clerical and administrative areas, but said functions were now harbored by ABA. Under the new arrangement, ABI, at the end of the regular accounting periods, compensated ABA on the basis of the same pro rata charge based on the relative gross income of each firm, utilized as between ABI and Harrisburg Drywall.[73] Nevertheless, the same employees performed the clerical, sales and warehouse functions for ABA and ABI.

Apparently, ABI, in 1980, no longer paid for telephone service, gasoline and utilities. The responsibility for such payments presumably was assumed by ABA, with the same charge back procedures utilized to secure ABI's share of such overhead items. As heretofore indicated,

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[72] See General Counsel's Exhibit 29(a). From the payroll records it appears that ABA did not employ field personnel until the week ending February 20, 1980. During that week Hinkelman was added to the ABA payroll. See General Counsel Exhibit 29(g).

[73] As was true between ABI and Harrisburg Drywall, no written agreement existed, evidencing the charge back procedure between ABA and ABI.

under said allocation system, the balance due was not paid until each June. Accordingly, a form of interest free credit was involved. Looking at the clericals for example, prior to the actual allocation, said employees were on the payroll of one company which financed their employment for an entire year before compensation was afforded by the other sharing their use.

With respect to tools and equipment, a document dated *April 1, 1980,* signed by Al Bryant on behalf of ABI and addressed to Al Bryant Associates, Inc., recited as follows:

> This is to confirm our willingness to *continue* rental of the office furniture and office equipment, (including the computer), to you at a monthly rent of $1,000 through March 31, 1981. [Emphasis supplied]
>
> It will be your responsibility to pay for all maintenance, services, and supplies. At the end of the rental period, the equipment should be in first class operating condition less normal wear and tear.

Another written agreement between ABI and ABA provided for the lease of scaffolding at the rate of $300 monthly. Beyond that no provision existed in writing with respect to the rental of vehicles, tools or equipment as between the two firms.

It does not appear that occupancy by ABA of the Hummingbird Lane facility was pursuant to written lease. As of January 1, 1980, Al Bryant and wife changed the basis for rental that previously existed. Thus, ABA was to pay Al Bryant and wife $2,000 monthly, and the rent paid by ABI in the past was

reduced by some $1,250 a month. In this latter connection, it is noteworthy that ABA did not actually make rental payments for January, February and March 1980 until June 10, of that year. See Respondent's Exhibit 8 and 9. It does not appear that interest was charged with respect thereto. It is also significant that the rental check in question named ABI as the payee, rather than Al Bryant personally.

Like its administrative staff, ABA drew substantially from its predecessors in developing management and on the job capability. Charles May who had performed field supervision on jobs for both Harrisburg Drywall and ABI, continued to perform in that capacity on behalf of ABA, and was the sole employee who regularly furnished field supervision on behalf of ABA. Bryant and Hoffman continued to sign checks on behalf of ABA as had been the practice with ABI and Harrisburg Drywall.[74] McClain continues to provide the same services for ABA as he did for ABI and Harrisburg Drywall. Obviously, since ABA continued in the same business as Harrisburg Drywall and ABI, it utilized the same crafts and skills as the latter. Thus, the former warehousemen employed by ABI, became the warehousemen at Associates. He continues to do warehouse work for ABI, though no longer on the payroll of that Company.

With respect to the carpenters, Bryant and McClain met with office personnel and carpenters employed by ABI and Harrisburg Drywall to inform them of the formation of ABA. At that time, employment was

[74] It is noted in this regard that Bryant even signed checks compensating himself under the so-called consultant agreement with ABA.

offered with the new firm by McClain.[75] McClain testified that almost all the ABI personnel were retained by ABA. The payroll records in evidence indicate that field employees were first employed by ABA during the payroll period ending February 13, 1980.[76] All seven within this initial group had been on the payroll of Harrisburg Drywall in each prior payroll period in 1980.[77] Of this group, four worked for ABI in 1979 and all appear on the Harrisburg Drywall payroll for that year. All in all, the 1980 payrolls of ABA show a total of 21 employees apparently in nonsupervisory field categories. Of this group, only 8 had no employment history with ABI or Harrisburg Drywall.[78]

With respect to ABI's somewhat abbreviated 1980 operations, only four field personnel were utilized during that period. According to my analysis, the total man-hours expended by ABI in 1980 was 377.5. Of those, only eight hours were worked by employees not on the 1980 payroll of ABA.

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[75] See testimony of Donald Myers, who had previously worked for ABI and Harrisburg Drywall, and was among those that accepted employment with ABA.

[76] See G.C. Exh. 29(f).

[77] See G.C. Exh. 31(a), 31(b), 31(c), 31(d) and 31(e).

[78] The names of the 8 new hires and the initial payroll period in which they first appear are as follows:

Gerald Clemson	May 28, 1980
Roy Shana Felter	June 25, 1980
John Anthony	June 25, 1980
Gary Eugene Cupp	August 13, 1980
Dennis B. Shade	August 13, 1980
Luke K. Kine	September 10, 1980
Jay Fred Mark	September 17, 1980
Samuel Varney	September 24, 1980

It concluded that ABA was the alter ego of Al Bryant, ABI, and Harrisburg Drywall. It was formed with knowledge of the labor difficulties and unfair labor practice charges confronting ABI and Harrisburg Drywall, and continued with an identical business purpose and objective. Administrative, managerial sales, engineering, warehousing and clerical employees were simply removed from the payroll of one firm one day and appeared on the payroll of the other the next. For the first 5 months of its existence, ABA drew exclusively from the Harrisburg Drywall blue collar work force. Like Harrisburg Drywall, it utilized the equipment of ABI and shared administrative and clerical support with that firm. I am also convinced that management of ABA continued to function as it had with respect to ABI and Harrisburg Drywall. McClain who, though president of ABA could not recall his own salary, or that of Hoffman, and other details concerning the operation of ABA, is deemed to have continued with ABA as he had before, in the operational duties of assigning employees to jobsites, preparing bids and estimates and engaging generally in trouble-shooting of an operational nature as he had for Harrisburg Drywall and ABI. Control of the clericals remained the responsibility of Hoffman. Charles May, continued to provide field supervision for ABA as he had with respect to ABI and Harrisburg Drywall. The functions of Hendrickson, the engineer, as well as salesmen presumably continued as previously while they were on the payroll of ABI. With respect to Al Bryant, himself, who was considered by the undersigned on many counts to be an unreliable witness, I am convinced that he continued to function as the principal source of ABA

policy and executive authority utilizing his contacts and expertise in all areas of the drywall industry to justify his $40,000 annual salary, a sum which apparently exceeded that earned by both Hoffman and McClain.[79] Bryant admittedly continued to sign checks for ABA as well as contracts on behalf of that entity.

Based on the foregoing, including Bryant's own expressed reasons for the demise of Harrisburg Drywall and reduction of ABI's volume, and as Hoffman and McClain were fully aware of the unfair labor practice charges pending against Harrisburg Drywall and ABI at the time of their apparent investments in ABA, I find that the reshuffled capitalization of ABA did not suffice to disassociate ABA from its predecessor firms nor to preclude an inference on the substantial evidence

[79] In 1980, according to the payrolls in evidence, ABI was reduced to slightly above inactive status. The demands upon Bryant personally as a result of those operations would only have been minimal. Although Bryant was ABA's vice-president in charge of sales, that firm retained ABI's two salesmen to discharge that function. Despite the foregoing, Bryant admittedly spent 3 to 5 days at the facility occupied by ABI and ABA. Most suspect were his denials of knowledge as to certain operational aspects of ABA. This included an implicit denial of (1) where ABA obtained its employees, (2) in what capacity ABA employed Frank Krautheim or how the latter got on the payroll of ABA, (3) who purchased supplies for ABA and (4) who instructed clericals of ABA to work on behalf of either ABA or ABI. Bryant also denied knowledge as to whether records were kept as to the amount of time that ABI trucks were used by ABA, did not know whether ABA carpenters were hourly paid, and could not identify who prepared bids on behalf of ABA or whether ABA completed work left incomplete by Harrisburg Drywall as of January 1, 1980. I am convinced that Al Bryant was far more active in the affairs of ABA, at every level, including its inception, than he would have me believe.

presented that it was merely a "disguised continuance" or alter ego through which contractual obligations to Keystone and Western and putative statutory remedies were to be avoided.[80] Accordingly, I find that Respondent violated Section 8(d) and Section 8(a)(5) and (1) of the Act by ABA's failure to honor the CPSA contract when performing with the geographic jurisdiction of Keystone.

Conclusions Of Law

1. Al Bryant, Inc., Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., together constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Al Bryant Associates, Inc., is the alter ego of and a disguised continuance of Al Bryant, Inc., and Harrisburg Drywall and Construction Corporation.

3. United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, and Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

4. (a) All journeymen, layout men and apprentices employed within the geographic jurisdiction of Keystone District Council of the United Brotherhood of Carpenters

[80] *N.L.R.B.* v. *Triumph Caring Center*, 571 F. 2d 462, 468 (C.A. 9, 1978) enfg. 222 NLRB 627 (1976); *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 (1942); *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 259, ftn. 5 (1974).

and Joiners of America, AFL-CIO, by employer-members designating CPSA as their collective-bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc.), but excluding other craftsmen, guards and supervisors as defined in the Act, constitutes an appropriate collective-bargaining unit within the meaning of Section 9(b) of the Act.

(b) All journeymen carpenters, layout men, and apprentices employed within the geographic jurisdiction of Carpenters' District Council of Western Pennsylvania of the United Brotherhood of Carpenters and Joiners of America by employer-members designating CPSA as their bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant, Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act, constitute an appropriate unit within the meaning of Section 9(b) of the Act.

5. (a) Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees described in paragraph 4(a) above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

(b) United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees defined in paragraph

4(b) above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. Respondents have violated Section 8(a)(5) of the Act by refusing to recognize Keystone as representative of the employees in the unit described above in paragraph 4(a) and by, since March 19, 1979, refusing to abide by the terms of the collective-bargaining agreement negotiated on their behalf by CPSA with respect to said employees on the Payroll of Harrisburg Drywall and by, since January 1, 1980, refusing to abide by the terms of said contract with respect to said employees on the payroll of Al Bryant Associates, Inc.

7. Respondents violated Section 8(a)(5) and (1) of the Act by since June 2, 1979, failing and refusing to recognize Western as representative of employees in the unit described above in paragraph 4(b) and by failing and refusing to apply the terms of the contract negotiated on their behalf by CPSA to said employees on the payroll of Harrisburg Drywall and Construction Corporation.

8. The aforesaid unfair labor practices have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 8(d) and Section 8(a)(1) and (5) of the Act, it shall be recommended that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

It having been concluded that the appropriate bargaining units include employees of Al Bryant, Inc., Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., and that said Respondents commencing at various times refused to bargain collectively with the Unions by refusing recognition and to apply the collective-bargaining agreement to their employees in the appropriate unit, Respondents shall be ordered to recognize Western and Keystone and to apply the appropriate collective-bargaining agreement negotiated by CPSA to its employees retroactive to March 19, 1979, in the case of Keystone, and retroactively without time limit in the case of Western and jointly and severally make unit employees of Harrisburg Drywall and Al Bryant Associates whole for any loss of earnings or other compensation they may have suffered by the unlawful refusal to apply the appropriate collective-bargaining agreement to them and to the reimburse the trust funds provided for in the collective bargaining and to remit contributions it has failed to make on behalf of the unit employees of Harrisburg Drywall and Al Bryant Associates, thereunder, with interest as authorized by *Florida Steel Corporation*, 230 NLRB 651 (1977).[81]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[81] *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Appendix A—Opinion of the Administrative Law Judge of July 27, 1981.

ORDER[82]

The Respondents, Al Bryant, Inc., Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., Harrisburg, Pennsylvania, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of employees in an appropriate unit described below, by refusing to recognize and to apply the collective-bargaining agreement with said labor organization to the unit employees of Harrisburg Drywall and Construction Corporation. The appropriate unit is:

> All journeymen, carpenters, layout men and apprentices employed in the geographic jurisdiction of United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, by employer-members designating CPSA as their collective bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding other craftsmen, guards and supervisors as defined in the Act.

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[82] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to bargain collectively with Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by refusing to recognize and apply the terms of the governing collective-bargaining agreement to the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc. in the appropriate unit. Said unit is:

> All journeymen, carpenters, layout men, and carpenter apprentices employed in the geographic jurisdiction of Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, by employer-members designating CPSA as their collective bargaining representative (including Al Bryant, Inc., Harrisburg Drywall and Construction Corporation, and Al Bryant Associates, Inc.), but excluding all other craftsmen, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Recognize United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation in the aforesaid unit with respect to rates of pay, wages, hours of employment and

other terms and conditions of employment and apply the terms of the appropriate collective-bargaining agreement negotiated by CPSA and said labor organization retroactively.

(b) Recognize Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of the employees of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc. in the aforesaid unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and apply the collective-bargaining agreement with said labor organization to said employees, retroactive to March 19, 1979.

(c) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation and Al Bryant Associates, Inc., who are represented by Keystone District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied since March 19, 1979, by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Jointly and severally make the employees within said unit of Harrisburg Drywall and Construction Corporation, who are represented by United Brotherhood of Carpenters and Joiners of America, Carpenters'

District Council of Western Pennsylvania, AFL-CIO, whole for any loss of earnings or other compensation they may have been denied by the refusal to apply the terms of the collective-bargaining agreement to them, and reimburse the appropriate trust funds provided therein for those contributions which it has failed to make on behalf of said employees in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(f) Post at its Harrisburg, Pennsylvania, facility, copies of the attached notice marked "Appendix."[83] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondents' authorized representatives, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

[83] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD," shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(g) Notify the Regional Director for Region 6 in writing, within 20 days from the date of this Decision, what steps Respondents have taken to comply herewith.

Dated, Washington, D.C. July 27, 1981

JOEL A. HARMATZ
Joel A. Harmatz
Administrative Law Judge

Order of the Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

For The Third Circuit

(Stamp Illegible)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AL BRYANT, INC., HARRISBURG DRYWALL AND CONSTRUCTION CORPORATION, and AL BRYANT ASSOCIATES, INC.,
Respondents.

No. 82-3169.

JUDGMENT

Before: WEIS, SLOVITER and BECKER,
Circuit Judges

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain issued by it against Respondents Al Bryant, Inc., Harrisburg, Drywall and Construction Corporation, and Al Bryant Associates, Inc., Harrisburg, Pennsylvania, their officers, agents, successors, and assigns on February 11, 1982. The Court heard argument of respective counsel on January 13, 1983, and has considered the briefs and transcript of record filed in this cause. On June 30, 1983, the Court

being fully advised in the premises, issued its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondents, Al Bryant, Inc., Harrisburg, Pennsylvania, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that Costs shall be taxed against Respondents.

BY THE COURT

DOLORES K. SLOVITER
Circuit Judge

DATED: July 25, 1983

Office - Supreme Court, U.S.
FILED
DEC 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-446

In the Supreme Court of the United States

OCTOBER TERM, 1983

AL BRYANT, INC., ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the NLRB correctly found that the unions' unfair labor practice charges were filed within the six-month limitations period imposed by Section 10(b) of the National Labor Relations Act.

2. Whether the NLRB properly exercised its discretion in refusing to defer to an arbitration decision that did not consider or decide the unfair labor practice issue presented to the Board.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 711 F.2d 543. The decision and order of the National Labor Relations Board (Pet. App. A27-A114), including the attached decision of the administrative law judge, is reported at 260 N.L.R.B. 128.

JURISDICTION

The judgment of the court of appeals (Pet. App. A115-A116) was entered on July 25, 1983. The petition for a writ of certiorari was filed on September 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Al Bryant, Inc. (ABI), Harrisburg Drywall and Construction Corp. (Harrisburg Drywall), and Al Bryant Associates, Inc. (Associates) are contractors engaged in

the construction of ceilings, floors and drywall. The National Labor Relations Board found that ABI and Harrisburg Drywall constitute a single employer under the National Labor Relations Act, that Associates is the alter ego and a disguised continuance of ABI and Harrisburg Drywall, and that the companies' employees together constitute an appropriate bargaining unit (Pet. App. A29, A106-A107). The Board found that the companies violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize the charging unions as the exclusive bargaining representatives of Harrisburg Drywall and Associates employees and by refusing to apply the terms of agreements between the unions and ABI to the other two companies (Pet. App. A106-A108). The court of appeals affirmed (*id.* at A1-A26). Petitioners do not contest these findings, but rather challenge only the timeliness of the unfair labor practice charges involved and the Board's refusal to defer to an arbitration award in making its "single employer" finding.

1. ABI was formed by Albert Bryant in 1967. ABI is a member of the Central Pennsylvania Subcontractors Association (CPSA), which conducts labor negotiations on behalf of its members and which has negotiated agreements with both charging unions, the United Brotherhood of Carpenters District Council of Western Pennsylvania (Western) and Keystone District Council (Keystone). ABI has been bound by these agreements with the unions since 1974 (Pet. App. A49-A51).[1] Keystone and Western operate in different geographic areas.

In 1971, Bryant acquired ownership of Harrisburg Drywall. Harrisburg Drywall at no time signed any agreement with either union. Harrisburg Drywall engaged in the same

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[1]ABI signed a separate agreement with the International Carpenters Union in 1972 (Pet. App. A46).

construction activity as ABI but functioned as the nonunion component of a "double breasted" operation with ABI (Pet. App. A49).

Beginning in 1977, Keystone began to receive complaints from carpenters employed by Harrisburg Drywall in Keystone's jurisdiction that they were being paid less than union scale. On March 19, 1979, Keystone sent ABI a letter asserting that Harrisburg Drywall was related to ABI and that Harrisburg Drywall was covered by the collective bargaining agreement between CPSA and Keystone. Harrisburg Drywall continued to operate on a nonunion basis. Thereafter, Keystone initiated grievance and arbitration proceedings against ABI seeking to bind Harrisburg Drywall to the terms of the contract (Pet. App. A12-A13, A51).

Keystone contended in arbitration that Harrisburg Drywall, as a subsidiary of ABI, was bound by the CPSA agreement as a matter of contract and also as a matter of federal labor law because the two companies constituted a single employer under the Act. The arbitrator expressly declined to resolve the statutory issue and ruled that Harrisburg Drywall was not a subsidiary under the contract (Pet. App. A88-A90; see C.A. App. 777-780).[2] He therefore

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[2]The arbitrator stated (C.A. App. 777, 779-780; see Pet. App. A88):

> The Union in effect argues that Al Bryant, Inc. * * * established a subsidiary, Harrisburg Drywall and Construction Corporation; and that it has violated these Agreements in not requiring the subsidiary to comply with their terms * * *. Furthermore, the Union contends that, under rulings of the National Labor Relations Board, these two companies should be regarded as a "single employer" for purposes of the National Labor Relations Act * * * and that under the NLRB's *Collyer* deferral policy "the Arbitrator should rule on the statutory issue as well as the contractual one."
>
> * * * * *
>
> [T]he basic question before the Arbitrator is whether Harrisburg Drywall is a "subsidiary" or "subsidiary building construction

denied Keystone's grievance on October 29, 1979. On August 10, 1979, while the arbitration was pending, Keystone filed unfair labor practice charges against ABI and Harrisburg Drywall for "hiring non-Union employees in contravention of its obligation under the collective bargaining agreement" and for "having a non-Union subsidiary and refusing to recognize the Union as a representative of the employees employed by Harrisburg Drywall" (Pet. App. A6, A52).[3]

As found by the administrative law judge (ALJ), Western learned in January 1979 that Harrisburg Drywall had been awarded a contract in its jurisdiction for work on the Polk Center. A Western business representative telephoned Mr. Al Bryant and was informed that Harrisburg Drywall intended to perform the contract on a nonunion basis, notwithstanding Western's assertion that the job was covered by the CPSA. In May 1979 Bryant spoke with another Western official, who again asserted that the job should be performed under the union contract. Bryant responded, "I'll get back to you," but did not do so. Harrisburg Drywall began work on the Polk Center in June 1979 and performed the job on a nonunion basis. Pet. App. A55-A56. Western filed an unfair labor practice charge on October 3, 1979, alleging that ABI "d/b/a Harrisburg Drywall" had "[s]ince on or about June 1, 1979, and at all

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company" of Al Bryant, Inc. under * * * the Agreement. * * * In the Arbitrator's view, his role is limited to interpreting these terms of the Agreement, and it does not extend to enforcing the provisions of the Labor Management Relations Act.

[3]Petitioner Associates was not formed until 1979. Keystone filed an amended unfair labor practice charge on October 6, 1980, charging Associates and the other two companies with a refusal to bargain in good faith with Keystone (Pet. App. A6, A52-A53). Petitioners challenge the timeliness only of Keystone's initial charge against ABI and Harrisburg Drywall.

times thereafter, * * * failed and refused to bargain collectively and in good faith with [Western]" (Pet. App. A6).

2. a. The Board, substantially adopting the findings and conclusions of the ALJ, found that the charges of both unions were timely filed. With respect to the Western charge filed on October 3, 1979, the Board found that the six-month limitation period of Section 10(b) of the Act, 29 U.S.C. 160(b),[4] commenced when Harrisburg Drywall began work on the Polk Center in June 1979, not in January 1977 when Western learned of Bryant's *intention* not to abide by the CPSA contract (Pet. App. A57). With respect to the Keystone charge of August 10, 1979, the Board found that ABI's failure properly to respond to the union's March 19, 1979 letter constituted a refusal to bargain that commenced the Section 10(b) period, although Keystone had been aware of Harrisburg Drywall's nonunion operations in its jurisdiction for more than six months before the charge was filed (Pet. App. A57-A61).

b. The Board also determined that petitioners constituted a single employer under the Act. In this connection, the Board refused to defer to the arbitrator's finding that Harrisburg Drywall was not an ABI "subsidiary" under the contract. The Board explained (Pet. App. A29-A30 n.2):

> We agree with the Administrative Law Judge that deferral to the arbitrator's award which was introduced into evidence is inappropriate in the instant case. In so doing, we find that the arbitrator expressly declined to resolve the statutory issue before us. Thus, in his decision the arbitrator expressly stated that the "basic question before the Arbitrator is whether

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[4]Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

> Harrisburg Drywall is a 'subsidiary' or 'subsidiary building construction company' of Al Bryant Inc. . . ." within the intendment of the contract. He specifically stated that his role was limited to interpreting the terms of the agreement and did "not extend to enforcing the provisions of the Labor Management Relations Act." The arbitrator then found that the NLRB and court cases cited to him by the Union were not enlightening as to the definition of a "subsidiary" and thus he relied on dictionary definitions. Based on the tenor of the arbitrator's entire decision, it is clear he did not consider the statutory issue. It is also clear that the arbitrator did not have the same evidence before him as in the instant case.

3. The court of appeals affirmed (Pet. App. A1-A26). The court found that the Board's conclusion that the charges were timely filed was "consistent with well-established legal principles" and with the policies underlying Section 10(b) (Pet. App. A7-A12).

With respect to the Board's refusal to defer, the court of appeals explained (Pet. App. A15):

> The requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights. * * * The Board recently reaffirmed it would not defer "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-47 (1980). Given the arbitrator's explicit statement that he was not resolving the statutory issue, and the fact that he did not have all the relevant evidence before him, we cannot hold that the Board abused its discretion in refusing to defer to the arbitral award.

ARGUMENT

1. Petitioners contend (Pet. 9-20) that the unfair labor practice charges were not timely filed. They contend that the unfair labor practice against Western occurred when Bryant stated his intention in January 1979 not to adhere to the CPSA contract on the Polk Center job. They further contend that any unfair labor practice affecting Keystone occurred when Harrisburg Drywall began operating in its area in 1977, and that the refusal to respond to the union's March 19, 1979 letter was not an independent violation. These contentions were correctly rejected by the Board and the court below and raise no issue warranting review by this Court.

a. The Board's position that Keystone's March 19, 1979 letter triggered the limitations period is consistent with this Court's decision in *Local Lodge No. 1424, International Association of Machinists* v. *NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), and every court of appeals decision that has considered the effect of Section 10(b). In *Bryan Manufacturing Co.*, the Court described the policy underlying Section 10(b) as intended "to bar litigation over past events' after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused * * *.' " 362 U.S. at 419 (quoting H.R. Rep. 245, 80th Cong., 1st Sess. 40 (1947)). The Court held that Section 10(b) bars a charge grounded on events predating the limitations period "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice" (362 U.S. at 416-417). Section 10(b) does not bar a charge where conduct within the period constitutes an unfair labor practice in and of itself, even though related events predate the limitations period (*id.* at 416).

In *Bryan Manufacturing Co.*, the only act within the Section 10(b) period was the enforcement of a union security agreement valid on its face. This activity, by itself, was benign and could be impeached only by resorting to an event outside the limitations period — *i.e.*, by showing that the union lacked majority status when it entered into the agreement. The Court therefore held that the complaint was barred. Here, by contrast, petitioners' refusal to bargain after March 19, 1979 was unlawful in itself without reference to the illegality of prior events.

Because an employer's general duty to bargain is a continuing obligation, each refusal constitutes a separate and independent unfair labor practice. *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 858 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *NLRB* v. *Basic Wire Products, Inc.*, 516 F.2d 261, 267-268 (6th Cir. 1975). Based on the interrelationship of the companies at the time of the March 19 demand and their obligation to apply the contract at that time, the March 19 refusal may be found to violate the Act without regard to any prior refusals to bargain. In such circumstances, the courts have uniformly held that Section 10(b) is no bar to an unfair labor practice finding.[5]

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[5]See, *e.g.*, *Chesapeake & Potomac Telephone Co.* v. *NLRB*, 687 F.2d 633, 637-638 (2d Cir. 1982) (employer refusals to produce information related to grievance proceeding); *J. Ray McDermott & Co.* v. *NLRB*, *supra* (repeated refusals to bargain); *NLRB* v. *Basic Wire Products, Inc.*, *supra* (repeated refusals to bargain); *General Motors Acceptance Corp.* v. *NLRB*, 476 F.2d 850, 853-854 (1st Cir. 1973) (employer campaign to discredit union involving conduct over a two-year period); *NLRB* v. *Erie Marine, Inc.*, 465 F.2d 104, 107-108 (3d Cir. 1972) (employer domination of joint employee-employer committee over a period of three years); *Cone Mills Corp.* v. *NLRB*, 413 F.2d 445, 448-449 (4th Cir. 1969) (employer refusals to provide information concerning pension plan); see also *NLRB* v. *Los Angeles Yuma Freight Lines*, 446 F.2d 210, 215 (9th Cir. 1971) (employer refusal to bargain, after union makes renewed request within the limitations period, would constitute independent violation).

The cases cited by petitioner (Pet. 19) (*NLRB* v. *Serv-All Co.*, 491 F.2d 1273 (10th Cir. 1974); *NLRB* v. *McCready & Sons, Inc.*, 482 F.2d 872 (6th Cir. 1973); *NLRB* v. *Field & Sons, Inc.*, 462 F.2d 748 (1st Cir. 1972)) are not to the contrary. Those cases involve an employer's refusal to execute within the Section 10(b) period an individual union contract following negotiation of a multiemployer agreement that predated the period. The refusal to sign, standing alone, is not an unfair labor practice; it can be found to be one only by reference to events surrounding the multiemployer negotiations (*i.e.*, whether the employer was a member of the multiemployer unit and was bound by the negotiations). Indeed, the court in *Field & Sons* expressly distinguished that case ("a failure to perform a particular act") from the situation presented here, involving an employer's repeated breach of the general duty to bargain, where the violation can be determined based on the status of the employer within the limitations period. See 462 F.2d at 751; see also Pet. App. A12.[6]

b. The Board's conclusion that the Western charge was timely is consistent with the well-established principle that a statement of intent to commit an unfair labor practice does not start the Section 10(b) period running. The limitations period begins only when the unfair labor practice occurs. *NLRB* v. *Plumbers & Pipe Fitters Local Union 214*, 298 F.2d 427, 428 (7th Cir. 1962); see also *Local 1104, Communications Workers* v. *NLRB*, 520 F.2d 411, 416 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976); *Mack Trucks, Inc.*, 230 N.L.R.B. 993, 1000 (1977), enforced, 573 F.2d

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[6]There is no merit to petitioner's contention (Pet. 18) that the decision below effectively eliminates Section 10(b) and opens the door to large backpay awards stretching far back in time. To the contrary, the remedy is limited to six months before filing of the charge. See Pet. App. A12 n.4.

1302 (3d Cir.), cert. denied, 439 U.S. 825 (1978). The violation here occurred when Harrisburg Drywall violated the CPSA contract by beginning the Polk Center job in June 1979, not when Mr. Bryant merely stated his intention in January to perform the job on a nonunion basis.

Moreover, contrary to petitioners' contention (Pet. 14-15), even if Mr. Bryant's statement to Western in January were itself a violation of the Act, Section 10(b) would not bar a charge based on the subsequent refusal to apply the contract at Polk Center in June. Under the principles discussed above, the refusal to apply the contract in June 1979 was an independent and complete violation notwithstanding conduct that might have occurred earlier.[7]

2. Petitioners contend that the Board erred in refusing to defer to the arbitrator's finding that Harrisburg Drywall was not a "subsidiary" under the ABI contract. They contend that this finding was a "complete defense" to Keystone's unfair labor practice charge (Pet. 22). This contention does not warrant review by this Court.

Section 10(a) of the Act, 29 U.S.C. 160(a), vests the Board with exclusive authority to adjudicate and remedy unfair labor practices. See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decision takes precedence over arbitral awards that enforce private contract rights. See *Carey*

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[7]Petitioners' reference (Pet. 11-15) to Section 8(f) of the Act, 29 U.S.C. 158(f), governing pre-hire agreements is wholly irrelevant. There is no question here of the majority status of the unions, and the ALJ explicitly found that Section 8(f) was not applicable (Pet. App. A74 n.33).

v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). In exercising its discretion, the Board has determined to defer to an arbitration decision only if (1) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act; (2) the arbitration procedures are fair and regular; (3) the parties have previously agreed to be bound by the arbitrator's decision; and (4) the arbitrator has considered and decided the unfair labor practice issue presented to the Board. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Raytheon Co.*, 140 N.L.R.B. 883, 884-885 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

As noted above (page 3, *supra*), the Keystone grievance argued both that Harrisburg Drywall was a subsidiary of ABI as a matter of contract and that the two companies constituted a "single employer" under the Act. The arbitrator expressly declined to decide the statutory question whether the connection between the companies supported a finding of an unfair labor practice, explaining that the question before him was whether Harrisburg Drywall was a subsidiary under the contract. He specifically stated that his role was "limited to interpreting [the contract terms], and it does not extend to enforcing the provisions of the Labor Management Relations Act" (Pet. App. A88; C.A. App. 779-780).

The arbitrator relied on two dictionary definitions of "subsidiary" in deciding the contractual question.[8] That inquiry differs substantially from the statutory single

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[8]The arbitrator stated (Pet. App. A89; C.A. App. 780):

> Here, the parties have not defined what should be considered to be a "subsidiary." Webster's New World Dictionary (College Edition) defines a "subsidiary" in part as:
>
> > a company controlled by another company which owns most of its shares . . .

employer question, in which the Board examines the evidence as to interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). Moreover, as the Board noted, the arbitrator did not have before him all the evidence relevant to the statutory question (Pet. App. A29-A30 n.2).[9]

The Board reasonably may decline to defer where, as here, the unfair labor practice and contract claims pose substantially different issues and the arbitrator does not reach the statutory claim. *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155, 161 (3d Cir. 1981), cert. denied, No. 81-1438 (Apr. 18, 1983); *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-147 (1980). Also, the Board may reasonably decline to defer where, as here, the arbitrator has not considered "all the facts required to decide [the statutory issue]." *NLRB* v. *General Warehouse Corp.*, 643 F.2d 965, 969 (3d Cir. 1981) (footnote omitted). See also *United Parcel Service, Inc.* v. *NLRB*, 706 F.2d 972 (3d Cir. 1983), cert. denied, No. 83-71 (Nov. 7, 1983).

Black's Law Dictionary, Fourth Edition (revised) 1968 states:

> Subsidiary Corporation. One in which another corporation owns at least a majority of the shares and thus has control
>
> . . .

[9]For example, the arbitrator did not have the employment rosters of Harrisburg Drywall or any information that Mr. Bryant signed bids for Harrisburg Drywall (Pet. App. A30 n.2). This information was available to the Board (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12